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**Supreme Court of the United States**

**OCTOBER TERM, 1964**

**No. 134**

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**PARAGON JEWEL COAL COMPANY, INC.,  
PETITIONER,  
vs.  
COMMISSIONER OF INTERNAL REVENUE.**

---

**No. 237**

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**COMMISSIONER OF INTERNAL REVENUE,  
PETITIONER,  
vs.  
ROBERT LEE MERRETT, ET UX., ET AL.**

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**ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE FOURTH CIRCUIT**

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**NO. 134 PETITION FOR CERTIORARI FILED JUNE 1, 1964**

**NO. 237 PETITION FOR CERTIORARI FILED JULY 1, 1964**

**NO. 134 CERTIORARI GRANTED OCTOBER 12, 1964**

**NO. 237 CERTIORARI GRANTED OCTOBER 26, 1964**

**SUPREME COURT OF THE UNITED STATES**

**OCTOBER TERM, 1964.**

**No. 134**

**PARAGON JEWEL COAL COMPANY, INC.,  
PETITIONER,**

*vs.*

**COMMISSIONER OF INTERNAL REVENUE.**

**No. 237**

**COMMISSIONER OF INTERNAL REVENUE,  
PETITIONER,**

*vs.*

**ROBERT LEE MERRITT, ET UX., ET AL.**

**ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE FOURTH CIRCUIT**

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[fol. A]

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**BEFORE THE TAX COURT OF THE UNITED STATES**

Docket No. 84122

**ROBERT LEE MERRITT and WINNIE MERRITT, Petitioners,**

v.

**COMMISSIONER OF INTERNAL REVENUE, Respondent.**

PETITION—Filed November 23, 1959

The above-named petitioners hereby petition for a re-determination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency, (Symbols: Ap:RI:ABD:MTM) dated August 26, 1959, and as a basis of their proceeding allege as follows:

1. The petitioners are husband and wife who reside in Grundy, Virginia. The returns for the years involved were filed with the District Director of Internal Revenue, Richmond, Virginia.

2. The notice of deficiency, a copy of which is attached hereto and made a part of this petition by reference, is dated August 26, 1959.

[fol. B] 3. The taxes in controversy are income taxes for the years 1954, 1955 and 1956, the detail of which is as follows:

Year	Deficiency	Sec. 294(d) Penalty
1954	\$ 848.48	\$343.74
1955	1,532.21	-0-
1956	3,373.52	-0-
<b>TOTAL</b>	<b>\$5,754.21</b>	<b>\$343.74</b>

4. The determination of tax in said notice of deficiency is based upon the following errors:

A. Respondent erred in increasing petitioners' distributive share of partnership income from the Standard Smokeless Coal Company for the year 1954 by the amount of \$3,455.27 on account of "depletion disallowed."

B. Respondent erred in increasing petitioners' distributive share of partnership income from the Standard Smokeless Coal Company for the year 1955 by the amount of \$5,111.59, on account of "depletion disallowed."

C. Respondent erred in increasing petitioners' distributive share of partnership income from the Standard Smokeless Coal Company for the year 1956 by the amount of \$6,918.36 on account of "depletion disallowed."

D. Respondent erred in determining that petitioners were liable for the addition to tax under Section 294(d)(1)(A) of the Internal Revenue Code of 1939 in the amount of \$208.50 for the year 1954 for failure to file a declaration of estimated tax.

E. Respondent erred in determining that petitioners were liable for the additions to tax under Section 294(d)(2) of the Internal Revenue Code of 1939 in the amount of \$135.24 for the year 1954 for substantial underestimate of estimated tax.

5. The facts upon which the petitioners rely are as follows:

A. Petitioners are United States citizens who are married and live in Grundy, Virginia. They filed joint Federal Income Tax returns for the years 1954, 1955 and 1956 with the District Director of Internal Revenue, Richmond, Virginia.

B. Petitioner, Robert Lee Merritt, is a general partner in Standard Smokeless Coal Company, a partnership which [fol. D] is engaged in the business of mining and producing coal. In 1954 and 1955 the other partners in this enterprise were G. Wesley Merritt of Louisa, Kentucky, and J. O. Watson of Louisa, Kentucky. Each partner had an approximately equal interest in the partnership in 1955 and each devoted most of his time to the business of the partner-

ship. In the year 1956 petitioner's partners in this enterprise were G. Wesley Merritt of Louisa, Kentucky, and Jack D. Merritt of Grundy, Virginia. In the year 1956 petitioner had approximately a 50% interest in the partnership while G. Wesley Merritt and Jack D. Merritt each had approximately a 25% interest in the partnership. In this year all partners devoted substantial time to the business of the partnership. J. O. Watson had a small interest in the partnership in the year 1956, and he devoted part of his time to the partnership business.

C. The Standard Smokeless Coal Company mined and produced coal during the years 1954, 1955 and 1956 under an oral agreement with the Paragon Jewel Coal Company, Inc., of Whitewood, Virginia. Under this agreement petitioner and his partners held the right to mine all coal [fol. E] within certain designated boundaries; they were required to, and did, make the investment necessary to mine and produce the coal; the partners had a capital interest in the coal in place, and the possibility of a return on their investment depended solely upon the extraction and sale of the coal which they produced.

D. During the years 1954, 1955 and 1956, petitioner and his partners held an economic interest in the coal which they produced under their agreements with Paragon Jewel Coal Company, Inc., and are entitled to percentage depletion under the Internal Revenue Codes of 1939 and 1954.

E. During the year 1954 Standard Smokeless Coal Company received gross income from coal produced under its contract with Paragon Jewel Coal Company, Inc., in the amount of \$103,850.66. The net income from the production of this coal, before the allowance of depletion, was \$30,636.64. Depletion was claimed in the partnership return in the amount of \$10,885.07.

F. Respondent disallowed the depletion claimed in the partnership return for the year 1954 and increased petitioners' distributive share of partnership income by the [fol. F] amount of \$3,455.27 which represents one-third of the depletion claimed by the partnership.

G. During the year 1955 Standard Smokeless Coal Company received gross income from coal produced under its contract with Paragon Jewel Coal Company, Inc., in the amount of \$153,347.89. The net income from the production of this coal, before the allowance of depletion, was \$36,044.47. Depletion was claimed in the partnership return in the amount of \$15,334.78.

H. Respondent disallowed the depletion claimed in the partnership return for the year 1955 and in respect of the disallowance increased petitioners' distributive share of partnership income by the amount of \$5,111.59 which represents one-fourth of the depletion claimed by the partnership.

I. During the year 1956 Standard Smokeless Coal Company received gross income from coal produced under its contract with Paragon Jewel Coal Company, Inc., in the amount of \$138,367.56. The net income from the production of this coal, before the allowance of depletion, was \$38,456.86. Depletion was claimed in the partnership return [fol. G] in the amount of \$13,836.76.

J. Respondent disallowed the depletion claimed in the partnership return for the year 1956 and increased petitioners' distributive share of partnership income by the amount of \$3,459.18 which represents one-fourth of the depletion claimed by the partnership.

K. Petitioners' failure to file a declaration of estimated tax was due to reasonable cause and not to willful neglect. Petitioners did not file an estimate of tax for the year 1954 and are not liable for substantially underestimating their tax.

L. In his notice of deficiency respondent determined that petitioners were liable for failure to file a declaration of estimated tax under §294(d)(1)(A) of the Internal Revenue Code of 1939 and for substantially underestimating their tax under §294(d)(2) of the Internal Revenue Code of 1939.

Wherefore, Petitioners pray this Court may hear the proceeding and:



1. Determine that the respondent erred in the matters set forth in sub-paragraphs A to E, inclusive, of paragraph 4 of this petition.

[fol. H] 2. Grant such other and further relief as this Court may deem proper.

John Y. Merrell, K. William O'Connor, 850 Shoreham Building, Washington 5, D. C., Attorneys for Petitioners.

*Duly sworn to by Robert Lee Merritt and Winnie Merritt, jurat omitted in printing.*

[fol. I]

#### ATTACHMENT TO PETITION

Aug 26 1959

REGISTERED MAIL

Ap:RI:ABD:MTM

Mr. Robert Lee Merritt and  
Mrs. Winnie Merritt, Husband and Wife  
Grundy, Virginia

Dear Mr. and Mrs. Merritt:

The determination of your income and liability for the taxable years ended December 31, 1954, December 31, 1955, and December 31, 1956 disclosed deficiencies in tax aggregating \$5,754.21 and penalty of \$343.74, as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiencies and penalty mentioned.

Within 90 days from the date of the mailing of this letter you may file a petition with the Tax Court of the United States, at its principal address, Washington 4, D. C., for a redetermination of the deficiencies and penalty. In counting the 90 days you may not exclude any day unless the 90th day is a Saturday, Sunday, or legal holiday in the District of Columbia, in which event that day is not counted as the 90th day. Otherwise, Saturdays, Sundays, and legal holidays are to be counted in computing the 90 day period.

Should you not desire to file a petition, you are requested to execute the enclosed form 870 and forward it to this office. The signing and filing of this form will expedite the closing of your returns by permitting an early assessment of the deficiencies and penalty, and will prevent the accumulation of interest, since the interest period terminates 30 days after receipt of the form, or on the date of assessment, or on the date of payment, whichever is the earliest.

Very truly yours,

Dana Latham  
Commissioner

By (Signed) H. O. BUTLER  
H. O. Butler  
Associate Chief, Appellate Division

Enclosures:  
Statement  
IRS Pub. No. 160  
Agreement Form 870

[fol. K]

*Statement*

Mr. Robert Lee Merritt and Mrs. Winnie  
Merritt, Husband and Wife  
Grundy, Virginia

Tax Liability for the Taxable Years Ended  
December 31, 1954  
December 31, 1955  
December 31, 1956

*Income Tax*

Year	Deficiency	Sec. 294(d) Penalty
1954	\$ 848.48	\$343.74
1955	1,532.21	-0-
1956	3,373.52	-0-
Totals	<u>\$5,754.21</u>	<u>\$343.74</u>

In making this determination of your income tax liability, careful consideration has been given to the report of examination dated November 19, 1957; to your protest dated May 16, 1958; and to statements made at the conferences held at Richmond, Virginia on October 23, 1958 and May 14, 1959.

A copy of this letter and statement has been mailed to your duly authorized representative, Mr. Jack Persinger, Richlands, Virginia.

*Taxable Year Ended December 31, 1954*

Adjustment to Taxable Income

Taxable income disclosed by return	\$ 6,752.62
Additional income and unallowable deductions:	
(a) Partnership income increased	3,455.27
Taxable income adjusted	<u>\$10,207.89</u>

Explanation of Adjustment

[fol. L] (a) Examination of the books and records of Standard Smokeless Coal Company (partnership) discloses that your share of the distributable income for the year 1954 is \$8,657.89. Inasmuch as you reported \$5,202.62, your taxable income has been increased by the difference of \$3,455.27, computed as follows:

Ordinary net income per partnership return	\$20,538.61
Add: Unallowable deductions:	
(1) Depletion disallowed	10,385.07
Corrected partnership ordinary net income	\$30,923.68
Your distributive share	8,657.89
Partnership income reported	<u>5,202.62</u>
Understatement of partnership income	\$ 3,455.27

Explanation of partnership adjustment:

(1) It has been determined that the partnership is not entitled to percentage depletion deduction claimed in the amount of \$10,385.07.

## Computation of Tax

Taxable income adjusted	\$10,207.89
Income tax (joint basis)	2,254.06
Add: Self-employment tax, per return	108.00
Total correct income tax liability	2,362.06
Tax disclosed by return: Original, Account. No. BF-1005458	1,513.58
Deficiency	848.48
Sec. 294(d) penalty (Exhibit A)	343.74

*Taxable Year Ended December 31, 1955*

## Adjustment to Taxable Income

Taxable income disclosed by return	\$ 9,193.63
Additional income and unallowable deductions:	
(a) Partnership income increased	5,481.52
Taxable income adjusted	<u>\$14,675.15</u>

## [fol. M] Explanation of Adjustment

(a) Examination of the books and records of Standard Smokeless Coal Company (partnership) discloses that your share of the distributable income for the year 1955 is \$17,981.42. Inasmuch as you reported \$12,499.90, your taxable income has been increased \$5,481.52, computed as follows:

Ordinary net income per partnership return	\$20,699.69
Add: Additional income and unallowable deductions:	
(1) Mining income increased	1,109.80
(2) Depletion disallowed	15,334.78
Corrected partnership ordinary net income	<u>\$37,144.27</u>
Your distributive share	\$17,981.42
Partnership income reported	<u>12,499.90</u>
Understatement	\$ 5,481.52



**Explanation of partnership adjustments:**

(1) It has been determined that income from mining was understated to the extent of \$1,109.80.

(2) It has been determined that the partnership is not entitled to percentage depletion deduction claimed in the amount of \$15,334.78.

**Computation of Tax**

Taxable income adjusted	\$14,675.15
Income tax (joint basis)	3,522.55
Add: Self-employment tax, per return	126.00
Total correct income tax liability	\$ 3,648.55
Tax disclosed by return: Original, Account No. BF-1005441	2,116.34
Deficiency	<u>\$ 1,532.21</u>

[fol. N]

***Taxable Year Ended December 31, 1956*****Adjustment to Taxable Income**

Taxable income disclosed by return	\$10,529.42
Additional income and unallowable deductions:	
(a) Partnership income increased	10,605.24
Taxable income adjusted	<u>\$21,134.66</u>

**Explanation of Adjustment**

(a) Examination of the books and records of Standard Smokeless Coal Company (partnership) discloses that your share of the distributable income for the year 1956 is \$24,899.50. Inasmuch as you reported \$14,294.26, your taxable income has been increased \$10,605.24, computed as follows:

Ordinary net income per partnership return	\$26,774.54
Add: Additional income and unallowable deductions:	
(1) Mining income increased	7,373.70
(2) Depletion disallowed	<u>13,836.76</u>

Corrected partnership ordinary net income	\$47,985.00
Your distributive share	24,899.50
Partnership income reported	14,294.26

Understatement	\$10,605.24
----------------	-------------

Explanation of partnership adjustments:

(1) It has been determined that the income from mining was understated to the extent of \$7,373.70.

(2) It has been determined that the partnership is not entitled to percentage depletion deduction claimed in the amount of \$13,836.76.

[fol. O] Computation of Tax

Taxable income adjusted	\$21,134.66
Income tax (joint basis)	5,711.17
Add: Self-employment tax, per return	126.00

Total correct income tax liability	\$ 5,837.17
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Tax disclosed by return: Original, Account No. BF-1006349	2,463.65
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Deficiency	\$ 3,373.52
------------	-------------

*Exhibit A*

Computation of Additions to Tax under  
Section 294(d) of the I.R.C. (1939)

*Sec. 294(d)(2):*

Corrected tax	\$2,254.06
6% of above	\$ 135.24

*Sec. 294(d)(1)(A):*

Corrected tax	\$2,254.06
---------------	------------

Less: Withholding tax actually withheld \$ -0-

Overpayment credit, if any, from a prior year -0- -0-

Balance to be divided into 4 installments due	\$2,254.06.
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[fol. P]

Amount Due	Installment Due Date	Date Paid	1% for Each Ad- ditional First Month Month or Unpaid Fraction		Not More Than 10% Assessable
			Unpaid	Fraction	
\$ 563.51	3-15-54	Unpaid	5%	5%	\$ 56.35
563.51	6-15-54	Unpaid	5%	5%	56.35
563.52	9-15-54	Unpaid	5%	5%	56.35
563.52	1-15-55	Unpaid	5%	2%	39.45
<hr/> <u>\$2,254.06</u>			Addition to Tax		<u>\$208.50</u>
			Total addition		<u>\$343.74</u>

[fol. Q]

[File endorsement omitted]

## BEFORE TAX COURT OF THE UNITED STATES

Docket No. 84122

[Title omitted]

REQUEST FOR DESIGNATION OF PLACE OF HEARING—  
Filed November 23, 1959

Come now the petitioners, by their attorneys, John Y. Merrell and K. William O'Connor, and in accordance with Rule 26 of the Rules of Practice Before the Tax Court of the United States,

Request that the Court designate that the hearing in the above-entitled proceeding be held at Washington, D.C.

John Y. Merrell, K. William O'Connor, 850 Shoreham Building, Washington 5, D.C.

[Stamp—Tax Court of the U. S.—Granted—Nov 24 1959—  
J. S. Murdock]

[fol. R]

[File endorsement omitted]

## BEFORE THE TAX COURT OF THE UNITED STATES

Docket No. 84122

[Title omitted]

ANSWER—Filed January 21, 1960

The Respondent, in answer to the petition filed in the above-entitled case, admits and denies as follows:

1, 2, and 3. Admits the allegations contained in paragraphs 1, 2, and 3 of the petition.

4. A to E, inclusive. Denies that respondent erred as alleged in subparagraphs A to E, inclusive, of paragraph 4 of the petition.

5. A. Admits the allegations of fact contained in subparagraph A of paragraph 5 of the petition.

5. B. Admits that the petitioner, Robert Lee Merritt, is a general partner in Standard Smokeless Coal Company, a partnership which is engaged in the business of mining and producing coal and that in 1954 and 1955 the other partners in this enterprise were G. Wesley Merritt of Louisa, Kentucky, and J. O. Watson of Louisa, Kentucky. Denies the remaining allegations of fact contained in subparagraph B of paragraph 5 of the petition.

5. C. Admits that the Standard Smokeless Coal Company mined and produced coal during the years 1954, 1955, and 1956 under an oral agreement with the Paragon Jewel Coal Company, Inc., of Whitewood, Virginia. Denies the remaining allegations of fact contained in subparagraph C of paragraph 5 of the petition.

5. D. Denies the allegations of fact contained in subparagraph D of paragraph 5 of the petition.

[fol. S] 5. E. Admits that depletion was claimed in the partnership return in the amount of \$10,385.07. Denies the remaining allegations of fact contained in subparagraph E of paragraph 5 of the petition.



5. F. Admits the allegations of fact contained in subparagraph F of paragraph 5 of the petition.

5. G. Admits that depletion was claimed in the partnership return in the amount of \$15,334.78. Denies the remaining allegations of fact contained in subparagraph G of paragraph 5 of the petition.

5. H. Admits the allegations of fact contained in subparagraph H of paragraph 5 of the petition, except it is denied that the amount of \$5,111.59 represents one-fourth of the depletion claimed by the partnership.

5. I. Admits that depletion was claimed in the partnership return in the amount of \$13,836.76. Denies the remaining allegations of fact contained in subparagraph I of paragraph 5 of the petition.

5. J. Admits the allegations of fact contained in subparagraph J of paragraph 5 of the petition.

5. K. Admits that petitioners did not file an estimate of tax for the year 1954. Denies the remaining allegations of fact contained in subparagraph K of paragraph 5 of the petition.

5. L. Admits the allegations of fact contained in subparagraph L of paragraph 5 of the petition.

6. Denies generally each and every allegation contained in the petition not hereinabove specifically admitted, qualified, or denied.

[fol. T] Wherefore, it is prayed that the deficiencies determined by the respondent be in all respects approved.

Hart H. Spiegel, Chief Counsel, Internal Revenue Service.

Of Counsel: Clarence E. Price, Regional Counsel, Ferd J. Lotz, Attorney, Internal Revenue Service, 603 Parcel Post Building, Richmond 19, Virginia.

[fol. U]

## CLERK'S NOTE

Petitions and Answers thereto in Docket Nos. 84123, 84124, 84125 and 84126 (G. Wesley Merritt and Fannie J. Merritt, Jack D. Merritt and Willa Gray Merritt, Virgil Bowling and Gladys Bowling and James O. Watson, 3rd and Lucy J. Watson, respectively, v. C. I. R.) are substantially similar to the Petition and Answer in Docket No. 84122 and have been omitted in printing.

[fol. V]

[File endorsement omitted]

BEFORE THE TAX COURT OF THE UNITED STATES

Docket No. 90766

PARAGON JEWEL COAL COMPANY, INCORPORATED, Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

## AMENDED PETITION—Filed February 16, 1961

The above named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency (correspondence symbols—Ap; Hu: RMK), dated November 2, 1960, and as a basis of its proceedings, alleges as follows:

1. The petitioner is a corporation organized under the laws of the State of Virginia with its principal office located at Bluefield, West Virginia. The returns for the periods here involved were filed with the District Director of Internal Revenue, Parkersburg, West Virginia.

2. The notice of deficiency, a copy of which is attached hereto and made a part of this petition by reference, is [fol. W] dated November 2, 1960.

3. The taxes in controversy are income taxes for the taxable years ending September 30, 1955, September 30, 1956 and September 30, 1957, the detail of which is as follows:

<i>Taxable Year</i>	<i>Deficiency</i>
September 30, 1955	\$ 2,529.29
September 30, 1956	36,588.04
September 30, 1957	57,021.20
Total:	<hr/> \$96,138.53

4. All of the deficiency for the taxable year 1955 is in dispute and there is an over-assessment for said year of approximately \$6,307.24. The amount of approximately \$35,887.68 is in dispute for the taxable year 1956. The amount of approximately \$56,187.52 is in dispute for the taxable year 1957.

5. The determination of tax set forth in said notice of deficiency is based upon the following errors:

A) Respondent erred in disallowing the deduction in the amount of \$33,986.65 as "over-riding" royalties paid to C. A. Clyborne for the taxable year 1955.

B) Respondent erred in increasing petitioner's percentage depletion by the amount of \$17,883.55 for the taxable year 1955. This percentage depletion should have been increased by only \$890.22 for said taxable year 1955.

C) Respondent erred in disallowing the deduction in the [fol. X] amount of \$43,204.21 as "over-riding" royalties paid to C. A. Clyborne for the taxable year 1956.

D) Respondent erred in decreasing the percentage depletion in the amount of \$24,158.32 for the taxable year 1956. The petitioner is entitled to an additional depletion allowance of \$1,652.25 for said year.

E) Respondent erred in disallowing the deduction in the amount of \$46,665.22 as "over-riding" royalties paid to C. A. Clyborne for the taxable year 1957.

F) Respondent erred in decreasing the percentage depletion in the amount of \$59,895.08 for the taxable year 1957. Petitioner is entitled to an additional depletion allowance of \$1,492.62 for said year of 1957.

6. The facts upon which the petitioner relies are as follows:

# I

A) Petitioner is a corporation organized under the laws of the State of Virginia, with its business office located in Bluefield, West Virginia. The income tax returns for the fiscal years ended September 30, 1955, September 30, 1956 and September 30, 1957 were filed with the District Director of Internal Revenue at Parkersburg, West Virginia. This corporation has coal properties located in [fol. Y] Buchanan County, Virginia, where it is the lessee of some 4,932 acres of bituminous coal land under eight separate leases.

B) The president and principal stockholder of this corporation, which was chartered on the 22nd day of October, 1951, is C. A. Clyborne of Bluefield, West Virginia. Mr. Clyborne has been the president of this corporation since its formation.

C) Mr. C. A. Clyborne has been engaged in the business of a coal broker and as a mine operator for many years prior to the formation of this corporation and his reputation and financial position was well-known throughout the area of southwest Virginia and West Virginia. As a result of his ability, experience, reputation and financial standing, he was able to procure coal leases in Buchanan County, Virginia by personal contacts and negotiations with the owners of the coal lands. These coal leases were secured beginning in the year 1946.

D) Prior to the formation of the taxpayer corporation, C. A. Clyborne acquired, in the year 1946, a certain coal lease known as the "Clyde Dennis Lease" from land owners in Buchanan County, Virginia; this lease being made between the land owners and C. A. Clyborne and J. H. Franks.

This lease required the payment of minimum royalties to the land owners, payment of taxes and a guarantee that the coal would be properly mined with maximum recovery. Failure to recover all of the merchantable coal imputes a liability to pay for said coal, even though not mined. Mr. [fol. Z] Clyborne was also required to pay a royalty of ten cents (10¢) per ton for each ton of coal mined from said lease. All of the obligations under this lease were personal obligations of C. A. Clyborne.

E) On October 22, 1951 the Paragon Jewel Coal Company, Incorporated was duly organized under the laws of the State of Virginia and thereafter Mr. Clyborne and Mr. Franks subleased the "Clyde Dennis" property to said Corporation for a royalty of 30¢ per ton for all coal mined. The Corporation thereafter paying this royalty to Clyborne who thereupon paid the landowners of the "Dennis property" the sum of 10¢ per ton as required by the original lease and C. A. Clyborne retained 15¢ per ton, as an "over-riding" royalty and paid to J. H. Franks, who had assisted Clyborne in securing this lease, the sum of 5¢ per ton as an "over-riding" royalty. The respondent has recognized the right of C. A. Clyborne to an "over-riding" royalty, but has reduced the amount of the "over-riding" royalty allowed to Clyborne from 15¢ per ton to 5¢ per ton, thus permitting the Corporation to charge the sum of only 20¢ per ton royalty as ordinary and necessary expenses of the Corporation.

F) Following the organization of said Corporation as aforesaid, it constructed a cleaning and processing plant and began the mining of coal from the leased coal lands. [fol. AA] C. A. Clyborne continued to secure additional coal leases from landowners in Buchanan County, Virginia, which were subsequently subleased to the Corporation under arrangements similar to those referred to in Paragraph E). The Corporation paid to Clyborne the full amount of the royalty and Clyborne remitted to the landowners the royalties due them and retained an "over-riding" royalty for himself. This sublease procedure was necessary because the landowners in Buchanan County, Virginia had personal knowledge of Mr. Clyborne's reputation, financial



condition and experience in the coal business. The landowners would not lease direct to the Corporation, and Clyborne was, therefore, required to secure these additional leases in his own name. As a result thereof C. A. Clyborne remained personally liable for all the terms and conditions of said leases and was personally responsible for the performance of same. The sublease from Clyborne to the Corporation did not release him from his own personal liability and responsibility to the landowners under the terms of the original leases. The respondent has disallowed that portion of the royalty paid by the Corporation to Clyborne which was in excess of the royalties paid by Clyborne to the landowners.

G) The total royalty paid by Paragon Jewel Coal Company, Incorporated for the coal, including the "over-riding" royalties retained by Mr. Clyborne, were in line with the [fol. BB] per ton royalties paid by other companies for coal lands of the same kind and quality in the area.

H) The "over-riding" royalties which C. A. Clyborne received from the coal mined from the five leases referred to in Paragraph F) were ordinary and necessary expenses of the Corporation, properly deductible as such and did not amount to a distribution of corporate profits to C. A. Clyborne.

## II

I) The petitioner, Paragon Jewel Coal Company, Incorporated, has a coal cleaning and processing plant located on its coal lands in Buchanan County, Virginia. The Corporation has an investment in this cleaning and processing plant of approximately seven hundred thousand dollars (\$700,000.00). In addition to the cleaning and processing plant the Corporation has constructed all necessary roads, bridges, electric power lines, and other facilities for the removal of the petitioner's coal from the land to petitioner's processing plant. In order to remove the coal from petitioner's leases, petitioner employs independent contractors to extract coal under a system known in the coal industry as the "drift mining" method. Petitioner builds the

roads to the mines and "faces" the mine for the independent contractor who then proceeds to remove petitioner's coal and deliver it by means of truck to the petitioner's processing plant. All coal mined by these contractors is brought to the processing plant owned and operated by the Paragon Jewel Coal Company, Incorporated where it is cleaned, weighed and graded. The contractors are paid an extraction fee for each ton of coal delivered to petitioner's processing plant. The cleaning and processing of the coal is an indispensable prerequisite to marketing the product and said coal in the condition in which it is delivered to petitioner is not commercially saleable.

J) When operations under the above arrangement first began and for some period thereafter, the work was performed under oral contracts. However, subsequently the oral agreements between the contractors and the petitioner corporation were formalized by written contracts which were signed by twelve of the fifteen contractors, covering thirty separate mine operations then mining the Paragon Jewel Coal Company coal. Only three contractors have continued to operate under the oral agreement heretofore existing between said contractors and petitioner. The terms of the oral agreements, however, were the same as in the written contracts which simply reduced to writing the understanding as it had existed before.

K) Under the terms of the oral contracts Paragon Jewel Coal Company faced the seam of coal for entry by the contractor. The contractor supplied his own equipment for mining the coal. Paragon Jewel directed the contractor [fol. DD] where he was to mine, but said contractor was not given any particular designated boundary of coal to mine, nor did he have the right to mine any particular area of coal to exhaustion. All coal extracted by the contractors had to be delivered to the petitioner's processing plant. The contractor is compensated by being paid a fixed sum for every ton of coal delivered to the petitioner at its processing plant. This price is not subject to change retroactively and any price change, if it does occur, can only take place prospectively, after due notice, so that at all

times the contractor knows the price he will receive for every ton of coal which he mines. Thus, it is the petitioner and not the contractor who bears the risk of the market. The contract is terminable at the will of either party. The contractors' equipment is readily moveable from place to place. The petitioner is entitled to the entire percentage depletion allowance on the price received by the petitioner, upon the sale of said coal, without deduction therefrom the amounts paid by the petitioner to the contractor for extracting petitioner's coal.

L) The government has allowed percentage depletion to the petitioner on the entire price received upon the sale of the coal as to all contractors who have executed written contracts, but has disallowed said percentage depletion to the petitioner on those sums paid to the contractors who [fol. EE] continue to operate under the oral agreement.

M) During the taxable years 1955, 1956 and 1957 the petitioner corporation had the economic interest in the coal in place and is entitled to all of the percentage depletion during said years.

N) The respondent, in denying a portion of the percentage depletion to petitioner herein, has, of necessity, rested its claim on that portion of Section 23 (m) of the 1939 Code, now Section 611 (b)(1) of the 1954 Code, which provides: "In the case of a lease, the deduction under this section shall be equitably apportioned between the lessor and the lessee." So far as coal is concerned, however, this situation with respect to percentage depletion has been altered by the effect of Section 325 (b) of the Revenue Act of 1951, as an amendment to Section 117 (k)(2) of the 1939 Code. Section 117 (k)(2) of the 1939 Code, as amended in 1951, was divided in 1954 into two sub-sections—Section 631(b), dealing with timber, and Section 631(c), relating to coal. Accordingly, when Section 23 (m) of the 1939 Code, now Section 611 (b)(1) of the 1954 Code, and Section 117 (k)(2) of the 1939 Code, now Section 631 (c) of the 1954 Code, are read together, there is no longer any depletion deduction to be "equitably apportioned between the lessor and the lessee" for the reason that the lessor is

no longer entitled to percentage depletion. The lessor re-[fol. FF] ceives capital gains or losses treatment in respect of his royalties. Therefore, there is nothing now to be apportioned and all percentage depletion belongs indivisibly to the lessee (petitioner herein) and petitioner is no longer obligated to share his allowance with any one. The contractors (who, it is assumed, uld be allowed the percentage depletion if denied to the petitioner) are not lessors, nor are they lessees. Congress well knew the difference between a lessee of wasting-asset property and a contractor whose activities resulted in depleting that property.

Wherefore, Petitioner prays that this Court may hear the proceeding and:

1. Determine that the respondent erred in the matters set forth in sub-paragraphs A to F, inclusive, of Paragraph 5 of this petition and,
2. Grant such other and further relief as this Court may deem proper.

LeRoy Katz, Counsel for Petitioner, Ritz Building,  
P. O. Box 1534, Bluefield, West Virginia.

Katz, Katz and Kantor, Attorneys at Law, Ritz Building, P. O. Box 1534, Bluefield, West Virginia.

[fol. GG] *Duly sworn to by C. A. Clyborne, jurat omitted in printing.*

[fol. HH]

## ATTACHMENT TO PETITION

Form L-21A (1-60)

(Emblem)

U. S. TREASURY DEPARTMENT  
 INTERNAL REVENUE SERVICE  
 OFFICE OF REGIONAL COMMISSIONER  
 APPELLATE DIVISION  
 P. O. Box 1816  
 HUNTINGTON 17, WEST VIRGINIA

Nov. 2, 1960

Ph. JA 5-8104

IN REPLY REFER TO  
 Ap;Hu:RMK

	Taxable Year Ended	Deficiency
<b>CERTIFIED MAIL</b>	Sept. 30, 1955	\$ 2,529.29
<b>Paragon Jewel Coal Company,</b>	Sept. 30, 1956	36,588.04
<b>Incorporated</b>	Sept. 30, 1957	57,021.20
<b>P. O. Box 730</b>		
<b>Bluefield, West Virginia</b>		

Gentlemen:

In accordance with the provisions of existing internal revenue laws, notice is given that the determination of your income tax liability for the above-noted taxable year(s) discloses a deficiency (or deficiencies) in the amount(s) shown above. The attached statement shows the computation of the deficiency or deficiencies.

If You AGREE to this determination, please sign the enclosed agreement, Form 870, and return it promptly to this office. An addressed envelope is enclosed for this purpose. The signing and filing of this agreement will permit an early assessment of the deficiency or deficiencies and will limit the accumulation of interest.

If You DO NOT AGREE, and do not sign and return the enclosed form, the deficiency or deficiencies will be assessed for collection, as required by law, upon the expiration of

ninety days from the date of this letter, unless within that time you contest this determination in the Tax Court of the United States by filing a petition with that Court in accordance with its rules, a copy of which may be obtained by writing to its Clerk, Box 70, Washington 4, D. C.

Very truly yours,

Dana Latham  
Commissioner

By WILBUR E. MYERS  
Wilbur E. Myers  
Associate Chief, Appellate Division

Enclosures:

Statement  
Agreement, Form 870  
Addressed envelope

[fol. II] Ap:Hu:RMK:JEA

### STATEMENT

Paragon Jewel Coal Company, Incorporated  
P. O. Box 730  
Bluefield, West Virginia  
(Formerly: P. O. Box 849  
Bluefield, West Virginia.

Tax liabilities for the taxable years ended  
September 30, 1955  
September 30, 1956  
September 30, 1957

Fiscal Year	Income Tax		
	Liability	Assessed	Deficiency
September 30, 1955	\$ 98,563.61	\$ 96,034.32	\$ 2,529.29
September 30, 1956	179,949.51	143,361.47	36,588.04
September 30, 1957	262,605.43	205,584.23	57,021.20
Total	\$541,118.55	\$444,980.02	\$ 96,138.53

In making this determination of your income tax liability, careful consideration has been given to the report of examination dated April 3, 1959; to your protest dated June 26, 1959; to the statements made at the conferences held on



March 20, 1959, March 25, 1959, November 16, 1959, and February 1, 1960; and to your claim for refund filed on July 31, 1956.

The issue raised in your claim for refund with respect to an additional bad debt has been allowed herein. However, other adjustments result in a deficiency. If a petition is not filed, a statutory notice of disallowance will be forwarded to you in accordance with the provisions of section 6532(a)(1) of the Internal Revenue Code of 1954.

A copy of this letter and statement has been mailed to your representative, Mr. LeRoy Katz, Ritz Building, Bluefield, West Virginia, in accordance with the authority contained in the power of attorney executed by you.

[fol. JJ] Paragon Jewel Coal Company, Incorporated

Statement  
Taxable Year Ended September 30, 1955

Adjustment to Income

Taxable income disclosed by amended return		\$182,153.89
Additional income and unallowable deductions:		
(a) Royalties	\$33,986.65	
(b) Depreciation	1,865.33	35,851.98
Total		\$218,005.87
Nontaxable income and additional deductions:		
(c) Depletion		17,883.55
Taxable income as adjusted		\$200,122.32

Explanation of Adjustments

(a) It is determined that you are not entitled to a deduction in the amount of \$33,986.65 deducted as "overriding" royalties to C. A. Clyborne. The payments are in the nature of a distribution of earnings and, therefore, are not deductible under section 162(a) of the Internal Revenue Code

of 1954 or any other section thereof. Accordingly, taxable income is increased by said amount.

(b) It is determined that the amount of \$27,937.31 represents a reasonable depreciation allowance to you for the taxable year ended September 30, 1955, within the meaning of section 167 of the Internal Revenue Code of 1954. Therefore, the amount of \$29,802.64 claimed in your amended return as depreciation has been reduced by the excessive deduction of \$1,865.33.

(c) It is determined that you are entitled to a deduction of \$146,152.45 for percentage depletion on coal production for the taxable year ended September 30, 1955. Therefore, the amount of \$128,268.90 claimed in your amended return for said year is increased by the amount of \$17,883.55.

#### Computation of Tax

Taxable income as adjusted	\$200,122.32
Income tax liability (52% of \$200,122.32 less \$5500.00)	98,563.61
Income tax assessed, Original, Acct. No. CI 12-4819-55	96,034.32
Deficiency in income tax	\$ 2,529.29
[fol. KK] Paragon Jewel Coal Company, Incorporated	

#### Statement

Taxable Year Ended September 30, 1956

#### Adjustments to Income

Taxable income disclosed by re- turn		\$289,490.57
Additional income and unallow- able deductions:		
(a) Royalties	\$43,204.21	
(b) Depletion	24,158.32	
(c) Depreciation	3,483.20	70,845.73
Total		\$360,336.30

**Nontaxable income and additional deductions:**

(d) Capital gains	\$ 272.52	
(e) Loss from sale of other assets	353.10	625.62
	<hr/>	<hr/>
Taxable income as adjusted		\$359,710.68

**Explanation of Adjustments**

(a) It is determined that you are not entitled to a deduction in the amount of \$43,204.21 deducted as "overriding" royalties to C. A. Clyborne. The payments are in the nature of a distribution of earnings and, therefore, are not deductible under section 162(a) of the Internal Revenue Code of 1954 or any other section thereof. Accordingly, taxable income is increased by said amount.

(b) It is determined that you are entitled to a deduction of \$201,074.96 for percentage depletion on coal production for the taxable year ended September 30, 1956. Therefore, the amount of \$225,233.28 claimed in your return for the said year is decreased by the amount of \$24,158.32.

(c) It is determined that the amount of \$40,625.15 represents a reasonable depreciation allowance to you for the taxable year ended September 30, 1956, within the meaning of section 167 of the Internal Revenue Code of 1954. Therefore, the amount of \$44,108.35 claimed in your return as depreciation has been reduced by the excessive deduction of \$3,483.20.

(d) It is determined that you realized a net gain from the sale or exchange of capital assets in the amount of \$5,926.10 for the taxable year ended September 30, 1956, in lieu of \$6,198.62 shown in your return. Accordingly, taxable income is decreased by the difference of \$272.52.

(e) It is determined that you had a loss from the sale of property other than capital assets in the amount of \$5,179.93 for the taxable year ended September 30, 1956 in lieu of \$4,826.83 claimed in your return. Accordingly, taxable income is decreased by the difference of \$353.10.

## [fol. LL] Paragon Jewel Coal Company, Incorporated

Statement  
Taxable Year Ended September 30, 1956  
Computation of Tax

Taxable income as adjusted	\$359,710.68
Less: Net long-term capital gain	5,926.10
	<hr/>
Balance	\$353,784.58
Partial tax (52% of \$353,784.58 less \$5,500.00)	\$178,467.98
Add: 25% of net long-term capital gain	1,481.53
	<hr/>
Income tax liability	\$179,949.51
Income tax assessed, Original, Acct. No. CI 12 3350-56	143,361.47
	<hr/>
Deficiency in income tax	\$ 36,588.04

## Taxable Year Ended September 30, 1957

## Adjustments to Income

Taxable income disclosed by re- turn	\$405,931.22
Additional income and unallow- able deductions:	
(a) Royalties	\$46,665.22
(b) Depletion	59,895.08
(c) Depreciation	3,095.85
	<hr/>
Taxable income as adjusted	\$515,587.37

## Explanation of Adjustments

(a) It is determined that you are not entitled to a deduction in the amount of \$46,665.22 deducted as "overriding" royalties to C. A. Clyborne. The payments are in the nature of a distribution of earnings and, therefore, are not deductible under section 162(a) of the Internal Revenue Code

of 1954 or any other section thereof. Accordingly, taxable income is increased by said amount.

(b) It is determined that you are entitled to a deduction of \$265,595.89 for percentage depletion on coal production for the taxable year ended September 30, 1957. Therefore, the amount of \$325,490.97 claimed in your return for the said year is decreased by the amount of \$59,895.08.

(c) It is determined that the amount of \$40,249.27 represents a reasonable depreciation allowance to you for the taxable year ended September 30, 1957, within the meaning of section 167 of the Internal Revenue Code of 1954. Therefore, the amount of \$43,345.12 claimed in your return as depreciation has been reduced by the excessive deduction of \$3,095.85.

[fol. MM] Paragon Jewel Coal Company, Incorporated

Statement  
Taxable Year Ended September 30, 1957

Computation of Tax

Taxable income as adjusted	\$515,587.37
Income tax liability (52% of \$515,587.37 less \$5,500.00)	\$262,605.43
Income tax assessed, Original, Acct. No. CI 12 2327-57	205,584.23
Deficiency in income tax	<u>\$ 57,021.20</u>

[fol. NN] [File endorsement omitted]

BEFORE THE TAX COURT OF THE UNITED STATES

Docket No. 90766

[Title omitted]

ANSWER TO AMENDED PETITION—Filed March 1, 1961

The Respondent, in answer to the amended petition filed in the above-entitled case, admits, denies, and alleges as follows:

1. Admits the allegations of the first sentence of paragraph 1 of the amended petition. Denies the allegations of the second sentence of paragraph 1 of the amended petition. In further answer to the second sentence of paragraph 1 of the amended petition, respondent alleges that the returns for the periods here involved were filed with the District Director of Internal Revenue, Richmond, Virginia.

2 and 3. Admits the allegations of paragraphs 2 and 3 of the amended petition.

4. Denies the allegations of paragraph 4 of the amended petition.

5. A) through F) Denies the allegations of subparagraphs A) through F) of paragraph 5 of the amended petition.

6.

I

A) Denies the allegations of subparagraph A) of Part I of paragraph 6 of the amended petition, except it is admitted that petitioner is a corporation organized under the laws of the State of Virginia, with its business office located in Bluefield, West Virginia.

B) Denies the allegations of subparagraph B) of Part I [fol. 00] of paragraph 6 of the amended petition, except it is admitted that the president and principal stockholder of this corporation, which was incorporated in October, 1951, is C. A. Clyborne of Bluefield, West Virginia, who has been the president of this corporation since its formation.

C) and D) Denies the allegations of subparagraphs C) and D) of Part I of paragraph 6 of the amended petition.

E) Denies the allegations of subparagraph E) of Part I of paragraph 6 of the amended petition, except it is admitted that in October, 1951 the Paragon Jewel Coal Company, Incorporated was organized under the laws of the State of Virginia.



F), G), and H) Denies the allegations of subparagraphs F), G), and H) of Part I of paragraph 6 of the amended petition.

## II

I) through N) Denies the allegations of subparagraphs I) through N) of Part II of paragraph 6 of the amended petition.

7. Denies generally each and every allegation of the amended petition not hereinbefore specifically admitted, qualified, or denied.

Wherefore, it is prayed that the relief sought in the amended petition be denied and the deficiencies determined by the respondent be in all respects approved.

R. P. Hertzog, Acting Chief Counsel, Internal Revenue Service.

Of Counsel: Clarence E. Price, Regional Counsel, Bart A. Brown, Jr., Attorney, Internal Revenue Service, 1201 Enquirer Building, Cincinnati 2, Ohio.

[fol. 1]

## BEFORE THE TAX COURT OF THE UNITED STATES

Docket Nos. 84122, 84123, 84124,  
84125, 84126, 90765, 90766

ROBERT LEE MERRITT and WINNIE MERRITT,  
G. WESLEY MERRITT and FANNIE J. MERRITT,  
JACK D. MERRITT and WILLA GRAY MERRITT,  
VIRGIL BOWLING and GLADYS BOWLING,  
JAMES O. WATSON, 3RD and LUCY J. WATSON,  
C. A. CLYBORNE and VERNICE H. CLYBORNE,  
PARAGON JEWELL COAL COMPANY, INC., Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

Before: Honorable William M. Drennen, Judge.

**Excerpts From Transcript of Proceedings—  
November 6-15, 1961**

## [fol. 2] APPEARANCES:

John Merrell, Esq., appearing on behalf of petitioners Robert Lee Merritt and Winnie Merritt, et al., Docket Nos. 84122, 84123, 84124, 84125 and 84126.

Leroy Katz, Esq., Bluefield, West Virginia;  
Carl C. Gillespie, Esq., Tazewell, Virginia; and  
Frederick Bernays Wiener, Esq., Washington, D. C.,  
appearing on behalf of petitioners C. A. Clyborne and  
Vernice H. Clyborne, and Paragon Jewell Coal Com-  
pany, Inc., Docket Nos. 90765 and 90766.

Bart A. Brown, Jr., Esq., Internal Revenue Service,  
Washington, D. C., appearing on behalf of respondent.

[fol. 3] The Court: Now, in accord with our pretrial con-  
ference in this case, I think I will just state for the record

the agreed procedure. And if I am wrong in any particular, will you just mention it when I finish.

[fol. 5] Now, on the depletion issue it is my understanding that the respondent takes sort of a neutral position.

That would not deprive you of the right to put on rebuttal evidence if it seems necessary. But as I understand it, at present there is no plan on behalf of the respondent on any depletion issue.

Mr. Brown: That is correct, your Honor.

[fol. 140] C. A. CLYBORNE was called as a witness on behalf of the petitioner [Paragon], and, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Katz:

[fol. 170] Q. Now as to the royalty which is paid by the Paragon Jewel Coal Company for these properties which were transferred to it, to whom are those royalties paid?

Mr. Brown: If the Court please, I object to the use of the term "royalty" because that is the issue in this case.

The Court: Well, they are called royalties in the agreements at least, I suppose.

Mr. Katz: I don't think there is any question.

By Mr. Katz:

Q. To whom are the royalties paid, Mr. Clyborne?

A. Paragon pays the royalty to C. A. Clyborne.

Q. Then what does C. A. Clyborne do with the royalty he receives?

A. Pays to respective lessors involved.

Q. And when Mr. Franks is also receiving an overriding [fol. 171] royalty of two and a half cents who pays him?

A. I do.

Q. Now on all of these leases have you retained personally the liability for the minimum royalties?

A. Yes.

[fol. 176] Q. Now, Mr. Clyborne, you have been in the Buchanan area and producing coal in the Buchanan area for many years. Do you know the custom in the area for the payment of overriding royalties?

A. Yes.

Q. Are you familiar with that custom?

A. Yes.

Q. Is there such a custom in the Buchanan County area?

A. Very prevalent.

Q. And the payment of an overriding royalty then is customary in that area?

Mr. Brown: I object, your Honor.

The Witness: Yes, sir.

The Court: To what?

[fol. 177] Mr. Brown: To the leading questions again and again and again.

The Court: I think it would be better, Mr. Katz, if you ask him what the custom was rather than tell him.

By Mr. Katz:

Q. All right, what was the custom, Mr. Clyborne?

A. Ranges from 10 to 25 cents a ton.

The Court: What ranges from 10 to 25 cents a ton?

The Witness: It is a custom to override the royalties to rates 10 to 25 cents per ton, and your Honor, they are never put on record.

By Mr. Katz:

Q. You mean the overriding royalty?

A. The overriding royalty agreements in ninety percent of the leases are not put on record.

Q. In Buchanan County, Virginia?

A. Yes.

[fol. 184] Cross examination.

By Mr. Brown:

[fol. 223] Q. All right, let's talk about Brown number five.

A. Brown number five was purchased by C. A. Clyborne in 1952, and the Brown heirs number six, Paragon Jewel didn't have the money and they were in debt approximately \$300,000 at that time—

Q. Mr. Clyborne, do you mean to tell me—

Mr. Katz: I object, your Honor. He hasn't finished answering his question. He is interrupting his answer.

The Court: Let him finish the answer. Had you finished, Mr. Clyborne?

The Witness: What did I say?

(The reporter read the previous answer.)

The Witness: Oh, and six months behind on the bills.

By Mr. Brown:

Q. Mr. Clyborne, how much did Brown number five cost?

A. \$8,000.

[fol. 224] Q. And how much did Brown number six cost?

A. \$8,000.

Q. You mean that a corporation that can borrow \$300,000 can't borrow sixteen?

A. It looked dark there for a while, gloomy.

Mr. Brown: I have no further questions.

The Court: All right. Redirect.

Redirect examination.

By Mr. Katz:

Q. Mr. Clyborne, was there any reason for you to form a corporation to actually produce and to clean and process the coal instead of doing it yourself personally?

A. Yes.

Q. What was the reason?

A. The coal business is very hazardous and I was unwilling, having hit the skids twice, to ~~compose~~ what I had accumulated to the hazards of the coal business. I have known of friendly companies that had a million and a half dollars and three years later they were virtually broke. I know of one case where, or several cases that three, four, five million dollar companies went broke because of economics and because of wretched coal market conditions, and this was a new experiment and I was in an area that hadn't been too well proven.

There was one mine three miles away, but coal seams have a way of changing the characteristics sometimes over [fol. 225] distances of one or two miles, and I wasn't inclined to take unusual risks with what I had accumulated personally; and the seam ranged from four to thirty inches and I couldn't operate, I couldn't mechanize, and I evolved a method of building a processing plant and engaging the services of independent contractors and making allocations to them within practical means, and we were quite uncertain at the time whether that method of mining would, as a unit, work.

There had been prior to that time some operators that were primarily engaged in production, and they would select certain isolated areas for independent contractors to mine and bring coal to the tippie as supplementary to their main job.

But, as a matter of fact, most of my friends thought I was getting ready to wind up in the hands of the gentleman with the black sombrero.

Q. Well, at any rate, Mr. Clyborne, then the corporation was a means of isolating yourself, of course, from the dangers inherent in the coal producing business?

A. That's right.



[fol. 227] Recross examination.

By Mr. Brown:

[fol. 228] The Court: Mr. Clyborne, is Paragon Jewel an operating company? Does it produce itself?

The Witness: No, sir, it is a processing company, your Honor, and we engage the services of approximately 32 contractors to—we make allocations around the mountain and each one hires, discharges his own labor, pays his own compensation, and brings coal to our tippie, and we pay them for the raw coal every two weeks. We used to pay every week. Then we run it through the processing plant [fol. 229] and make these various sizes appropriate for the market, and that constitutes—

The Court: All production is done by independent—

The Witness: Independent contractors, on the American incentive plan.

The Court: And I gather then that you have never been directly connected with a producing company, have you, in your—

The Witness: Oh, yes. Just back years ago as a general manager of a small place.

The Court: But most of your experience has been in the sales?

The Witness: Yes, sir, primarily. 46 years of it. I am saying now that I am a sales agent, wholesaler and processor.

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[fol. 273] H. CLAUDE POBST was called as a witness on behalf of the petitioner [Paragon], and, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Gillespie:

Q. Mr. Pobst, what is your business or profession?

A. Practice of law.

Q. Where do you engage in the practice of law?

A. Grundy, Buchanan County, Virginia.

[fol. 274] Q. How long have you engaged in the practice of law in Buchanan County, Virginia?

A. I passed the Virginia State Bar and became licensed on June 10, 1906, 55 years ago last June.

Q. During that period of time, have you engaged in the practice of law in that county and area in behalf of coal companies?

A. I have. I practiced the first 13 years in Tazewell, Virginia, then in 1919, moved to Grundy, Buchanan County, Virginia, and have practiced there ever since. And am still practicing.

Q. Where is Tazewell County with relation to Buchanan County?

A. It is the adjoining county.

[fol. 285] The Witness: The overriding royalty—and I am talking about the royalty in addition to the royalty actually paid to the land owner—will run grossly from 10 to 25 cents. And sometimes, it will be more than that. I think it would be more material to state, your Honor, and I don't believe I have stated that, that in many instances these leases to the people who mine the coal are oral and not in writing at all.

[fol. 303] HIRAM A. STREET was called as a witness on behalf of the petitioner [Paragon], and, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Gillespie:

[fol. 313] Q. Mr. Street, the leases which Mr. Johnson secured that you have been testifying about, were they ever

actually reduced to writing and did they ever name H. J. Johnson as lessee in those leases?

A. The Hurt McGuire lease was never reduced to writing. As I have mentioned to you before, and in certain instances with certain people in Buchanan County, old residents, verbal understandings usually control and that particular lease was never reduced to writing.

[fol. 332]

Cross examination.

By Mr. Brown:

Q. Mr. Street, what effect does the thickness of coal of a particular seam have on the price that you can receive for this seam of coal?

A. Up to a certain height, if the coal is higher and cleaner, you can mine it with machines and it would bring a better price. In other words, that is one of the factors that would affect price.

Q. How thick a seaming before it gets too thick, that you can't use the machines?

A. You see, the difficulty is not getting too thick from the standpoint of using machines, but deals with being able to prop the roof up to prevent the mountain from falling in on you. To illustrate, the Clinchfield Coal Corporation has some coal which is reported to be 15 to 20 feet high, and they have these tremendous machines in there on hydraulic lifts, that cut the coal away and automatically [fol. 333] mine it at the rate of 100 tons per man per day, but when they start putting timbers up, major timbers that high, to hold the mountain off of you, that is where the difficulty comes in in height.

Now, the best coal, that is from the standpoint of miners mining in our section, that is what they generally like, is something around, I would say, 60 inches would be ideal, or in that section, because then they can get timbers for it, and without too much difficulty, they have better control and all.

Q. You mention there are several reasons why people don't record leases in Buchanan County. You mentioned one of them, what are some of the other reasons?

A. The one I mentioned was from the standpoint of land- [fol. 334] lords, what you lease it for. A second reason, under our state law, before an instrument can be recorded, it has to be acknowledged a certain way, and if not acknowledged, you can have two certifying witnesses, and then those witnesses have to be brought into the Clerk's Office and testify to the authenticity of the signature. Well, quite frequently in dealing with country people, if you go to make a deal, so to speak, and you have the man agreeing, you want to get his signature right then.

Now, if you wait around two or three days, he may find out somebody else would pay him a little more, and you would have a hard time closing, so a lot of the operators will have him sign, even without witnesses, or if they have one witness, they will have maybe the one witness sign, so there is a second reason the instrument by law cannot be recorded.

And then, some people we have, most of the coal that is independently owned, is owned by people who have lived in the county for generations. I come from maybe, I think my ancestors go back four or five generations in the one county. Well, my grandfather who is 93, he can be dealing with a man on a lease, and not at 93, they probably wouldn't take his word, but back when he was a younger man, knowing the man, and handshaking to a certain extent, is good. He goes in, starts mining, starts paying the check. If the [fol. 335] man dies, his heirs are only interested in the money and actually not even a lease entered into.

I can probably name you some more, but that gives you an idea of the factors that affect it.

. . . . .

[fol. 352] F. B. FOWLER was called as a witness on behalf of the petitioner [Paragon] and, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Gillespie:

Q. Mr. Fowler, how long have you lived in Grundy, Virginia?

A. Since 1934.

Q. How long have you lived in Buchanan County?

A. Since 1934.

Q. What is your business or occupation?

A. I am a coal miner, coal operator.

Q. What has been the extent of your activities in the coal mining business, Mr. Fowler?

A. Well, I mine coal and manage three different shipping facilities, buy and sell coal.

Q. And have you actually engaged in the extraction of coal inside the mines?

A. Yes, sir.

[fol. 355] Q. Are your leases both written as well as oral?

[fol. 356] A. Yes, sir.

Q. What about your assignments or subleases?

A. All of those are oral.

Q. You have no written assignments or subleases whatsoever then?

A. No, sir.

Q. Now, from whom do you obtain your leases?

A. Well, I would say they are about 30-70, 30 percent from the land owners and 70 percent from people that have leased it up in the past, prior years.

Q. And to whom do you sublet these lands which you have acquired?

A. To individuals and corporations.

Q. Are those individuals and corporations engaged in the actual production and processing of coal?

A. Yes, sir.



[fol. 383] J. P. SHOCKEY was called as a witness on behalf of the petitioner [Paragon], and, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Katz:

[fol. 387] Q. Those are the main leases. Now, Mr. Shockey, is it true or let me ask you this, does your company sublease any of these lands for the purpose of having the coal mined, in other words, are they leased out to producing coal companies?

A. Yes, sir, practically all of our mining is done by contractors.

Q. And have you then subleased these tracts to these other companies?

A. Yes, sir.

[fol. 388] Q. Is that done by oral or written agreement?

A. All of my contracts are oral.

[fol. 389] Cross examination.

By Mr. Brown:

[fol. 390] Q. I see. These some 40 contractors that you mentioned here in your testimony that you are subleasing to, how large are their operations?

A. Oh, they run from around 25 tons a day up to about 200 tons a day.

Q. What do they do with their coal after they mine it?

A. Well, they have to bring the coal to our preparation, to the preparation plant of New Garden Coal Corporation [fol. 391] unless I haven't gotten new orders and then I tell them to take it somewhere else. We collect the royalty ourselves, what is brought to us, and then the owner prep-

aration plants to which they deliver, they collect the money for New Garden Coal Corporation.

[fol. 440] HARLAN WALLS was called as a witness on behalf of the respondent, and, having been first duly sworn, testified as follows:

[fol. 461] Cross examination.

By Mr. Gillespie:

Q. Mr. Walls, I believe you say that originally your tippie and cleaning plant was constructed out of used, or second-hand, material?

A. That is correct.

Q. Which was moved there from some other point, is that correct?

A. Yes. I am familiar with that point because I was [fol. 462] in charge of that particular tippie in Tennessee, and at the time that the operations were stopped there, then the Jewell Smokeless Coal Corporation purchased that property and—I mean, purchased the tippie from that property, and moved it to Virginia.

[fol. 487] FRANK H. WOODS was called as a witness on behalf of the respondent, and, having been first duly sworn, testified as follows:

[fol. 488] Direct examination.

By Mr. Brown: ..

Q. Mr. Woods, what is your position?

A. I am the Treasurer and General Manager of the Paragon Jewell Coal Company.

[fol. 490] Q. Isn't it true that your company has ceased to mine on the Tazewell Coal and Iron property in 1957 and 1958?

A. I think it was 1959, but we have ceased mining on it, yes, sir.

Q. And why was that?

A. Well, I explained to you, we opened, I believe it was eleven places on there, and all of these places proved faulty. The first place that was driven in was about four hundred feet and the highest coal we had was seventeen inches. The farther along we progressed, the mining conditions got so bad that it was just impossible to keep anyone in there at the mine. A lot of them had a lot of water.

The top was bad, what we speak of as rotten top, and the conditions were so that we couldn't keep anyone there [fol. 491] that would mine the coal.

Of all the properties that we have, that was the worst mining conditions of any. For instance, one time, we had about fifteen or sixteen inches of coal and twenty-four inches to thirty inches of rotten top that would come on top of the coal. Before you could remove the coal, you had to remove the rot.

[fol. 497a] C. A. CLYBORNE was recalled as a witness on behalf of the respondent, and, having been previously duly sworn, testified further as follows:

Cross examination.

By Mr. Brown:

[fol. 502] Q. Now, Mr. Clyborne, isn't it true, with respect to the properties that we have involved in this case, that during the period that you held them in your name, before transferring them to Paragon Jewell, that you did nothing [fol. 503] to prove the raven seam on the particular properties?

A. I did nothing to prove the seam?

Q. Yes.

A. We had some openings up there for house coal for sale for local use, and I don't recall the extent of the prospecting that was done. It is too long ago.

Q. You didn't pay anybody to do any prospecting, did you?

A. If the books reflect it, I did.

Q. And that would be on your personal books and records?

A. Yes.

Q. You did nothing to develop the properties, did you, during that time? Build roads? Power lines? Anything like that?

A. No, there was not any occasion to do that because—

Q. You didn't face up the outcrop, or anything like that?

A. We may have faced it up, and the books will disclose it.

Q. And your personal books will show any expenses that you incurred in connection with that.

Mr. Clyborne, will you describe the Jewell seam of coal as a predictable seam?

A. A predictable seam?

[fol. 504] Q. Yes, sir.

A. To this extent, that it is—it ranges from, in the Whitewood area, from thirty inches down to two inches, and in some places pinches out entirely. We, in the industry, have always regarded it as an irregular seam, and a very thin seam.

Q. In other words, you would class it then as an unpredictable, rather than a predictable seam, wouldn't you?

A. I thought you said I would regard it as unpredictable. You see, with reference to the location, you may have thirty inches here (indicating) and thirty feet away, you may have ten inches.

That is unpredictable from my standpoint.

Q. Yes.

A. But we do know it to be irregular.

Q. Will you explain to us again why you decided to conduct the operation by means of a corporation, rather than personally?

A. The coal business, in history, will show it, that it is highly hazardous, and since I have been in the business in 1940—I mean, since 1915, hundreds and hundreds of companies have gone broke, and the factors of the market—no market, curtailed market, unpredictable seams, quality—variation in quality—it is a very uncertain business, and I would not attempt, with what little accumulations I had, [fols. 505-506] at that time; to expose it to the hazards of the production end, particularly a thin seam of coal, where you could not mechanize, which could not be mechanized, and which it was necessary to develop by hand-loading.

The risk was unusual, although we realized the quality of coal was tops—one of the most outstanding coals in the world, but thin and difficult to mine.

Q. Now you say that you considered the risks unusual. What do you mean by that?

A. Hazardous.

Q. Unusual?

A. Extremely hazardous.

Q. To what extent had this thirty-inch Jewell seam been mined prior to Paragon Jewell's operations?

A. Only by the Jewell Ridge Coal Corporation, and in that area they had from thirty-two inches to a high of five feet.

Q. Now what—

A. They invaded that area in 1910. They were pioneers in that area, and had a complete lock on the situation there from 1935 or 1936 up until 1945.

Q. You wouldn't consider the seam of coal that they were mining as a thin seam?

A. It was known as relatively thin, but there is, in the area in which they cover, five miles away, the coal was [fol. 507] thicker, and they could mechanize to a limited extent.

Q. Were you the first one to actually attempt to mine this twenty-six to thirty-two inch seam?

A. In a major way, yes.

Q. You also mentioned that you were a pioneer in a large-scale contract mining operation. What do you mean by that?

A. Up until that time conventional operators had, from time to time, engaged the services of independent contractors in isolated areas to bring the coal to the tippie, which was utilized primarily to mine their own coal, but these isolated areas where these contractors were engaged and the production was supplementary to the main body of the coal operated by the producing companies.

Up until that time, no other independent had attempted to build a tippie and engage, exclusively, the use of independent contractors to mine coal and deliver the raw coal to the tippie.

We had no certainty that independent contractors would be available. We—being optimistic, we expected that some would be available from these other areas that had been operating in a partial way on other conventional mining properties.

[fol. 508] Q. Was your method of operation, of using exclusively contract miners, was that considered hazardous by the professionals in the coal mining field?

A. I regarded it as hazardous. I do not know of any professionals who undertook it, except normal mining in a small way at Seaboard, Virginia.

Q. So then you were the real pioneer of this type of operation?

A. In a major way, yes.

[fol. 586] Mr. Brown: If the Court please, I think originally I am, on behalf of the government, to make a brief opening statement setting forth the government's position and then the parties will go forward with their opening statements and proof.

[fol. 587] The issue in this case is whether under these [fol. 588] oral contracts Paragon Jewel passed an economic interest in coal in place to these various coal companies.

Respondent's position in these particular cases is that one of the parties is entitled to the percentage depletion deductions in question. Both cannot be entitled to it since



both are claiming percentage depletion to the same amounts of mining income.

Both parties are represented by counsel, both of the real parties in interest, Paragon Coal and the coal companies, and respondent believes that under these circumstances it is appropriate that it remain neutral insofar as the trial of this case is concerned, and we intend to do so.

[fol. 612] C. A. CLYBORNE was recalled as a witness on behalf of the petitioner [Paragon], and, having been previously duly sworn, testified as follows:

[fol. 613] Direct examination.

By Mr. Gillespie:

[fol. 621] Q. Did you have any other employees on the job, Mr. Clyborne?

A. We had a superintendent.

Q. And what were the engineer's duties?

A. Initially to engineer the contours of the outcrop, to determine the acreage in each tract, and then he would confer with the contractors from time to time on projections and change of projections and set the spads and do the engineering inside the mine.

Q. Now you say that after you made your complete preparations to begin producing coal you got contractors. Did you or your company make written contracts with these contractors initially or not?

A. No.

Q. They were all verbal contracts?

A. That is true.

[fol. 622] By Mr. Gillespie:

Q. You stated you had a superintendent. Who was that, Mr. Clyborne?

A. L. P. Grogan.

Q. Where is he at this time?

A. He died within the past year.

Q. How long was he superintendent at this operation?

A. As I recall, it was three to four years from the inception of the work.

Q. And who was it that personally negotiated these verbal contracts with these mines?

A. Mr. Grogan.

Q. Was he given any authority from you or other officials of Paragon Jewel Coal Company relative to the terms of this contract?

A. Yes.

Q. Will you state what his authorization was?

Mr. Merrell: I object. I would like to first know if that authorization is in writing, if there is a written authorization.

By Mr. Gillespie:

Q. Was it written or verbal authorization?

A. Verbal.

[fol. 623] By Mr. Gillespie:

Q. In order to satisfy Mr. Merrell, will you state what Mr. Grogan's instructions were with relation to the terms of these verbal contracts with the truckman operators who came there to mine the coal?

A. In discussions we formulated a policy, and that was to engage the services of the contractors if, as, and when they were available, and in collaboration with them, the engineer, insist on choosing a location.

Q. What do you mean by a location?

A. Where the work would begin. Mr. Grogan would go up and show the contractor the various openings and it would be a matter of choice with them sometimes, particularly the first few that appeared on the scene looking for an engagement.

Q. All right, go ahead, Mr. Clyborne.

A. And the policy was to tell the contractors that they would mine the coal, take their depreciation, and we would

get the depletion because it was our coal, and subsequently [fol. 624] they would bring in their equipment, the equipment which they bought and had already bought from a prior engagement on some other job, and they would start to work.

[fol. 625] By Mr. Gillespie:

Q. What compensation were these contractors to receive from Paragon Jewel Coal Company for mining this coal?

A. At the outset we paid \$4 per ton extractive fee for raw coal delivered to the surge bin or the tipple.

Q. Well, has the basis of payment been changed since that time to the present date?

A. Yes, up and down.

Q. You mean the amounts have been changed?

A. The amount of the price we paid varied from time to time.

Q. But has the basis for compensating these operators been changed? Are they still paid on a tonnage basis?

A. They are paid on a tonnage basis for the coal delivered to the tipple.

Q. And I believe you stated that that has gone up and down during the years that have ensued since this operation started?

A. We pay them on a tonnage basis less two and a half percent for scale percentage reject. The washer rejects a substantial amount of impurity arising from the mining of the coal. Sometimes top gets into the coal, sometimes bottom, and sometimes both top and bottom.

Q. Mr. Clyborne, how long were these verbal contracts to continue between Paragon Jewel Coal Company and the contractors?

A. The policy as stated to Mr. Grogan was to terminate at will by either party.

[fol. 627] A. The policy was to have the coal delivered to our tipple exclusively unless by specific consent that in some

cases they had a little outcrop coal that they could dump over the hill, and we permitted them to do that.

Q. In other words, rash things of that kind?

A. That is unmerchtable. It was completely outcrop.

Q. Of course, when I speak of the coal I usually mean coal that was expected to be sold on the market.

A. Merchtable.

Q. Has any of that type of coal ever been permitted to be taken any other place than your company's tippie?

A. Not that I recall. I don't know of any occasion.

Q. None has ever been delivered anywhere else to your knowledge?

A. That's right.

[fol. 629] Q. Now at the time Paragon formulated the policy which you have been testifying about and instructing Mr. Grogan with relation thereto was he ever instructed to make any different agreement with any of these contractors, or were they to be uniform?

A. Uniform throughout. That was the policy that was formulated.

Q. Mr. Clyborne, you have testified that these contractors were paid a fixed price per ton for mining this coal for your company. What was the basis upon which that price was fixed or what were the considerations which entered into a determination of the amount of that price?

A. We considered our investment, we considered the market, and we also considered the fact of depletion, and arrived at the price based on the fact that we would get the depletion. We were more liberal because of these factors, with particular reference to depletion. We were paying four dollars a ton when others in the over-all general area were paying 25 to 50 cents less.

Mr. Merrell: I object. It is not responsive and there can be a difference in the problems of mining. One seam of coal is easier to mine than another, and I move to strike this as not responsive.

[fol. 630] The Court: Well, I believe the question that was asked was the basis upon which Paragon Jewel set the price, and it was my impression he was testifying to what

the Paragon Jewel took into consideration. I realize that there might be different operating conditions which would have a bearing on the price, but as long as you limit your testimony to what Paragon Jewel took into consideration in fixing the price—

The Witness: Yes, sir.

By Mr. Gillespie:

Q. That is what I asked you, Mr. Clyborne, and of course if you will just confine your answer to the considerations which your company, Paragon Jewel Coal Company, took into account in arriving at this price.

Mr. Clyborne, was there anything in the price which your company paid these contractors that was tied into the market price directly or not?

A. Wasn't tied in directly. We considered the over-all market conditions and paid the contractors the best price that we could afford, and they always knew when they delivered coal to the tipples the price they would receive.

\* \* \* \* \*

[fol. 633] By Mr. Gillespie:

Q. Mr. Clyborne, the leases of Paragon Jewel Coal Company have been introduced in evidence in this case, and they provide that the lessees are required to mine 85 percent of the merchantable, mineable coal. Who is obligated under that provision of the lease?

A. Paragon.

Q. Do you know of any other person, firm, or corporation who has any obligation whatsoever to the landowners for royalties, land taxes, mining 85 percent of the merchantable [fol. 634] coal or performing any other of the requirements of those leases?

Mr. Merrell: I object, your Honor. That is too general—they are obligated to mine 85 percent. I maintain that they obligated my people to mine all merchantable and mineable coal, and there is a question of whether my people's obligation would go through to the landowners.

The Court: Well, are you objecting because this is sort of a multiple question?

Mr. Merrell: Yes.

The Court: He does ask a lot of things in it. The answer might be different as to each one of them. I realize you are just trying to save time, but I think you better take them one at a time.

By Mr. Gillespie:

Q. Mr. Clyborne, is there any other person, firm, or corporation who is in any way or in any manner obligated to pay any part of the royalties to the landowner for this coal?

The Court: Do you know of any?

The Witness: Answer?

The Court: Yes.

The Witness: No.

By Mr. Gillespie:

Q. Is there any other person, firm, or corporation that is obligated in any way, in any manner, for any part of [fol. 635] the taxes upon these lease hole lands?

A. No.

Q. Is there any other person, firm or corporation in any way or in any manner obligated to recover 85 percent of the mineable coal underlying these lands?

A. No.

[fol. 638] Q. To your knowledge, has he or any of his assistants ever laid off or surveyed in the specific tract or area upon your company's leasehold for the purpose of giving such tracts or area to any of these contractors so that they can remove all the mineable coal from it?

Mr. Merrell: Objection. That is so broad and it is not shown that he has any specific knowledge of what the engineer does from day to day.

[fol. 639] Judge Drennen: Well, it seems to me if he



simply says to his own knowledge this has never been done, it doesn't prove it hasn't been done. It proves that he doesn't know.

Mr. Merrell: All right. I will withdraw the objection.

Judge Drennen: You may answer.

The Witness: May I have it?

(The pending question was read by the reporter.)

The Witness: Yes.

By Mr. Gillespie:

Q. Did you understand the question?

The Witness: Read that over again, please.

(The pending question was reread by the reporter.)

The Witness: No.

By Mr. Gillespie:

Q. To your knowledge, have any of the contractors who have been engaged to mine the coal from the Paragon Jewel Coal Company's lands ever been required to mine all of the mineable coal from any specific tract or area?

A. No.

Cross examination.

By Mr. Merrell:

[fol. 642] Q. So in 1951 and 1952 Paragon Jewel was seeking production of coal, was it not?

A. Yes.

Q. In fact, it had already decided to rely exclusively on independent contractors, had it not?

A. Yes.

Q. And you were seeking independent contractors?

A. What was that?

Q. You were seeking independent contractors?

A. Yes.

Q. And you wanted people who would do a good job for you?

A. Yes.

Q. Have the Stillwell Brothers done a good job for you?

A. Yes.

Q. Have these other companies that I have mentioned produced a substantial amount of coal for you?

A. So far as I know, they have.

Q. And it was your policy of your company to encourage them to produce coal, was it not?

A. Quite so.

Q. And to make the investment and effort that was necessary to produce coal.

A. That is right.

[fol. 644] Q. Now, is it not true that Paragon Jewel has always taken all of the coal which the operators I have mentioned—

A. What was that second word?

I didn't hear you.

Q. Is it not true that the Paragon Jewel Company has [fol. 645] always taken all of the coal which the various operators that I have mentioned mined?

A. To the best of my knowledge, we have.

Q. You don't—to your knowledge they have never refused to take any of their coal.

A. We have never refused?

Q. Yes.

Well, have you ever refused to take any of the coal?

A. When they attempted to deliver out crop, very inferior coal, we wouldn't take that.

Q. Why wouldn't you take it?

A. Because of its inferior quality.

Q. Why don't you want inferior quality coal?

A. Well, we have a standard of quality to maintain with the commercial buyers and by-product plants abroad and in this country.

Q. Why didn't Paragon Jewel want to go into the production of coal?

A. We preferred the American incentive plan of the less fortunate people having an opportunity to make something substantially for themselves.

Q. You preferred to let someone else take that responsibility and reap the rewards or sustain the risk, is that right?

A. That is right.

[fol. 646] Q. Is it not true, Mr. Clyborne, that when these contractors made an agreement with you, that you allocated a particular area of coal to each contractor?

A. No.

Q. You never allocated?

[fol. 647] A. The policy was to take the potential independent contractor to one of various locations and have him make a selection, and to that extent we designated the place that they would start, the opening that they would start.

Q. I see.

A. And they took off from that point.

Q. Well, didn't you allocate an area of coal so they could make their plans?

A. Not a boundary, exclusive boundary. Just so they could get started because—

Q. You just gave them entrance in the side of the mountain?

A. That is right.

Q. And they had no basis for planning how much equipment they wanted to put in?

A. The engineer would make the projections for them up to a certain point.

Q. Well, he would give them—

A. And they were flexible. They would change it from time to time.

Q. He would allocate an area to them?

A. We designate an area, or if you prefer the word allocation, I suppose that is a synonym.

Q. He would designate an area for each contractor?

A. Designate a temporary—an area that they could take off and then the projections would be made.

[fol. 648] Q. I am asking, did the independent contractor when he started into the mountain, did he have a designated area of coal?

A. He has a flexible area.

Q. But no designated area of coal.

A. No specified designated boundary of coal, no.

Q. Now, is it not true that the prices which you paid the various contractors were based upon the market price of coal?

A. Indirectly.

Q. Did you pay them according to the market price of coal?

A. No. We agreed with them on a price. Or, rather, we stated what price we would pay and that price continued until there was some change in the market substantially, then we would raise it or lower it.

Q. In accordance with the market.

A. Indirectly.

Economics enter into this, too, you know.

Q. You take what—

A. Economics entered into this.

Q. Well, economics would enter into the market, I am sure.

A. But the contractor always knew what price he would receive when he delivered coal to the tippie.

Q. Did he know what price he would receive for the coal that was still left in the mountain?

A. There is no obligation on his part to assume that responsibility. That was ours.

[fol. 663] Q. Now, you testified that you paid wheelage for coal brought across a little piece of land called the White land, is that not right?

A. That is right.

Q. What was the amount of the wheelage you paid?

A. 2½ cents.

Q. 2½ cents a ton for coal brought across the White tract?

A. That is right.

Paragon Jewel is not involved in that.

Q. Paragon Jewel is not involved in that?

A. Except that they deduct the money to pay C. A. Clyborne.

[fol. 664] Q. They deduct what money?

A. They deduct from the contractors, deduct from that total.

Q. Oh, you require the contractor to pay the wheelage.

A. That is right. But they have a choice of coming across, 16 miles across—I mean, across the mountain at a haulage cost of 90 cents in the summer, a dollar in the winter.

Q. They are paying the  $2\frac{1}{2}$  cents a ton?

A. They elected to come this other way, across the White.

Q. So they cross the White tract and pay the  $2\frac{1}{2}$  cents a ton wheelage.

A. Pay 5 cents.

Q. And you remit  $2\frac{1}{2}$  of it the Whites.

A. That is right.

Q. In other words, you keep  $2\frac{1}{2}$  override on wheelage?

A. That is right. The negotiations—

. . . . .

[fol. 666] Q. On the power line that you constructed, you received a reimbursement from the Appalachian Power Company for your outlay in installing that power line, did you not?

A. I don't recall whether we did or not. The books would reflect it if we did.

Q. I see.

The Standard Smokeless Company has mined on your property continuously since they started, have they not, that is on the property of Paragon Jewel?

A. So far as I know.

Q. The same with these other companies that I have indicated?

[fol. 667] A. What other companies have you indicated?

Q. Far West?

A. Yes.

Q. Kyva, in a period of time until they had exhausted the mineral available to them, did they not?

Mr. Gillespie: We object to the form of the question, Your Honor.

By Mr. Merrell:

Q. Do you know whether Kyva is still mining there or not?

A. No, I do not.

Q. Do you know if Sally Mining Company is?

A. I believe that they are still there.

Mr. Merrell: Nothing further.

Redirect examination.

By Mr. Gillespie:

[fol. 668] Q. Now, there has also been some testimony about the wharfe which you received for crossing the White tract and that which was charged to the contractors who used that White tract.

A. That is right.

Q. Who acquired the easement across the White tract?

A. I did.

Q. Did Paragon Jewel Coal Company have anything to do with the acquisition of that easement?

A. No.

Q. Now, was there another means which Paragon Jewel Coal Company had provided for the contractors to get their coal to the tippie other than crossing the White tract?

A. Yes.

Q. Were the contractors who have used the White tract given the option to use that tract to get their coal to your tippie?

[fol. 669] A. They could use either route.



[fol. 673] CAUDLE BELCHER was called as a witness [for Paragon] and, having first been duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Katz:

[fol. 674] Q. What is your connection with the Paragon Jewel Coal Company?

A. I do their engineering inside the mines and outside them.

Q. How long have you been employed by the Paragon Jewel Coal Company?

A. Since some time in 1951.

Q. Is that from the very beginning of the corporation and its development?

A. Yes, sir.

[fol. 678] Q. Now, Mr. Belcher, at that time when they started to work, how far could they go into that mine?

A. Well, at that time we didn't know how far they could go.

Q. Will you please explain to the court why you didn't know how far they could go into that mine?

A. We didn't know what would be the local conditions inside.

Q. Now, when you start a mine, what is your job as an engineer?

Just what do you do?

A. Well, after it is opened up, you put your projections on and give them something to drive by.

Q. Now, what do you mean by projections, Mr. Belcher?

A. It is small lines put on a map showing how wide apart you are going to drive the entries.

Q. Do the projections determine the boundaries of a man's mine?

A. No, sir.

Q. Are those projections at any time absolute?

In other words, do they remain the same at all times or can they be changed?

[fol. 679] Mr. Merrell: Objection, Your Honor. He is leading the witness. He can ask him what the projections are, but he is trying to fasten them down to just what he wants.

Judge Drennen: I think it is a leading question.

Mr. Katz: I will rephrase the question.

By Mr. Katz:

Q. Mr. Belcher, just how do you—do you work the projections? How are they put on the map?

A. You put so many lines on the map as to the number of places they can work and you turn them in a general direction of the boundary of coal.

Q. Now, was there any other map in existence at the time that the Stillwell Brothers or Bare Ridge Coal Company came on the land to start operation of their mine?

A. Not as I know of.

Q. And, of course, you were the engineer in charge.

A. Yes.

Q. Now, all of this outside work that is done insofar as the surveying, who pays you for that?

A. Paragon Jewel Coal Company.

Q. And for the work that goes on inside the mine, that is, insofar as the engineering is concerned, who pays you for that?

A. The contractors.

[fol. 684] By Mr. Katz:

Q. Do you determine in which direction these mines will go?

A. Yes, sir.

Q. And now, Mr. Belcher, how do you determine in which direction they will go?

A. When you put your projections on the map back towards the body of the coal.

Q. And is that the direction that they will travel, then? Is that correct?

A. Yes, sir.

Q. Well, now, why is it at 1-K here, for example, you have a projection going to the right and one to the left?

A. To give them more places for tonnage.

Q. Now, I notice that there is another entry. Will you please mark that with a 3? I believe you stated you do not know the name of the mine that was operating there at the time?

A. No, sir.

Q. Now, please explain in what direction that mine that you have marked with a 3, what direction that was going.

A. That is going back parallel with Mine 1-K.

[fol. 685] Q. About how much space is between the two mines?

A. About 400 feet.

Q. And what do you do with the projections with respect to that mine number 3, Mr. Belcher?

A. You turn straight in the mine and turn in places to the right.

Q. Is it necessary to keep mine 1-K and mine 3 separated?

A. Yes, sir.

Q. Why?

A. Well, because of the state law and ventilation.

Q. Now, what is it that you keep between the two to keep them separated, Mr. Belcher?

A. You can put a dotted line on the map and when they approach that, you stop them.

Q. You stop them. And is that dotted line permanent?

A. No, sir.

Q. Now, Mr. Belcher, what happens if mine number 3 quits or did mine number 3 quit that you have marked number 3?

A. Yes, sir.

Q. What would happen with Mine Number 1-K in the event that Mine Number 3 quit?

A. Well, you drive some other mines through, mine them, and you would mine the coal.

Q. In other words, it changes so that you can pick up the coal that the other mine did not get, is that right?  
[fol. 686] A. Yes, that is right.

[fol. 688] Q. I will ask you, Mr. Belcher, whether or not this map shows any specific area or boundary of coal which any particular mine has the right to mine to exhaustion or—

A. No, sir.

[fol. 698] By Mr. Katz:

Q. Well, how do you stop them from mining into each other, Mr. Belcher? Or how are they stopped from mining into each other?

A. I tell them to stop or make a map and show them where the other mines are, to keep them from coming together.

Q. And that is done on the basis of the maps which you prepare?

A. Yes, sir.

Q. And do the spads have anything to do with that?

A. No, sir. When you stop them, you don't set no more spads.

Q. In other words, when you stop setting spads, they have got to stop, is that it?

A. That is right.

Q. Is there anything on this map—

A. That is right.

[fol. 699] Q. Is there anything on this map, Mr. Belcher, which gives any particular mine any particular area of coal which they can mine to exhaustion?

A. No, sir.

[fol. 703] Q. Now, Mr. Belcher, I note that some of these mines extend a long way and some go a relatively short distance. Will you please explain how that comes about?

A. Well, some of them hit rolls and they can't mine the coal. The others hit water or a bad top condition and they pull out.

Q. You mean they just leave?

A. That is right.

Q. What direction is the Stillwell mine going on this map?

[fol. 704] A. It goes behind the 5 other mines.

Q. Who determines who will get the coal between the Stillwell Mine and the 5 mines in back of it, if you know?

A. Well, Stillwell has got the most of it.

Q. In other words, he has already got most of it?

A. Yes, sir.

Q. Is there any specific boundary or area shown on this map which any of these mines could mine to exhaustion?

A. No, sir.

Q. Have the projections which are shown on all of these maps ever been changed?

A. Yes, sir.

[fol. 708] Q. Mr. Belcher, throughout the time that you have been there, have you at any time ever set out any specific area that any of these miners could mine to exhaustion?

Mr. Merrell: I am going to object to this. The question has been asked several times and he wasn't a party to the negotiations between the contractor and Paragon Jewel. He was an engineer, paid partly by Paragon Jewel and partly by the contractors.

Judge Drennen: The question is simply what he has done.

Mr. Merrell: What he has done on a physical document like a map?

Mr. Katz: Yes, or anywhere.

Judge Drennen: Well, yes, I gather that is—

Mr. Katz: It is whether or not he has ever surveyed off or blocked off any specific area for any of these miners to mine to exhaustion.

In other words, a specific area that you have been talking about, Mr. Merrell. He is the engineer in charge.

Mr. Merrell: Whether he has done that on a map, is that your question?

Mr. Katz: Whether he has done it on a map, on the land or anywhere else.

Mr. Merrell: All right. No objection.

By Mr. Katz:

Q. Have you ever done that, Mr. Belcher?  
[fol. 709] A. No, sir.

[fol. 725] C. B. BELCHER resumed the stand, and having been previously duly sworn, testified further as follows:

Further direct examination.

By Mr. Katz:

Q. Mr. Belcher, at the conclusion of the testimony on Friday you were still on the witness stand and we were asking you questions in connection with the contract which you entered into in 1955 with Mr. Woods at the time that you, yourself, started operating as a contractor on the Paragon Jewel lands. Do you recall that, sir?

A. As to the terms of the contract you mean?

Q. Yes, sir. Do you recall that, that we were discussing that?

A. Yes.

[fol. 726] Q. Now according to the terms of that agreement when were you to receive the money for the coal which you delivered to Paragon Jewel Coal Company?

A. They would keep us two weeks behind at the beginning, the best I remember.

Q. At any time after you had mined the coal and delivered it to the Paragon tippie could Paragon Jewel Coal Company refuse that coal?

A. No, sir.

Q. They were then required to pay you the agreed price or the agreed amount per ton?

A. Yes, sir.

[fol. 727] Q. Mr. Belcher, could Paragon Jewel Coal Company change the amount they paid you per ton or the amount that you received for mining the coal after you had actually mined the coal and delivered it to the tippie?



A. No, sir.

Q. Whom did you rely on to receive your money that you were to receive for mining the coal?

A. Paragon Jewel Coal Company.

Q. Did you know what price Paragon Jewel Coal Company received for mining that coal—I mean for selling that coal?

A. No, sir.

Q. Did they ever furnish you any kind of report as to what price they received for their coal?

A. No, sir.

[fol. 728]

By Mr. Katz:

Q. What, if anything, was said with respect to the termination of this contract?

A. Not anything to my remembrance.

Q. What was your understanding, if any, as to the rights to terminate this contract?

Mr. Merrell: I object, your Honor. He said that nothing was said about termination. That was his answer.

The Court: Well, but he has a right to state what his understanding was as part of the contract. I will overrule the objection.

By Mr. Katz:

Q. Will you answer that? What was your understanding as to the right of termination?

A. Well, so long as there was coal to mine you don't feel that there would be any termination.

[fol. 730]

Cross examination.

By Mr. Merrell:

Q. Now as I understand it, you are paid by Paragon for the outside engineering work?

A. Yes, sir.

[fol. 731] Q. And by the operators for the inside engineering work?

A. Yes, sir.

Q. And you are a mining engineer?

A. Yes, sir.

Q. Also a coal mine operator, is that right?

A. Yes, sir.

Q. What is the exploration stage of a coal mine?

A. I don't believe I get what you mean by that?

Q. What is regarded in the coal industry as the development stage of the coal mine?

A. I don't quite understand that.

Q. When you first start a coal mine operation are you able to produce a large amount of tonnage right at the beginning?

A. No, sir.

Q. It takes you some time to develop a mine until you get up to a certain tonnage, does it not?

A. That's right.

Q. And you have to plan your operation so that the mine is properly developed, do you not?

A. Yes, you lay out the mine.

Q. And then when you have laid it out and operate it and developed a sufficient area of places for men to work then your tonnage increases, does it not?

[fol. 732] A. Yes, sir.

Q. And that was true in the mine which you had on the Ritter property?

A. Yes, sir.

Q. And also on the mine which you had on Paragon Jewel's property?

A. Yes, sir.

Q. Now this seam of coal, the Raven Red Ash seam underlying the Paragon lease, is a difficult seam of coal to work, is it not?

A. In areas, yes.

Q. What causes the difficulty primarily?

A. You have rolls and falls.

Q. Rolls and falls is where the coal narrows down and you are concerned more with sandstone than you are coal, is that not true?

A. Yes, sir.

Q. Now what are pillars in a mine?

A. That is the coal you leave as you develop the mine.

Q. What is the purpose of leaving a pillar?

A. To protect the roof.

Q. To hold the roof up?

A. Yes, sir.

Q. What other measures do you take in mining to hold the roof up?

[fol. 733] A. Timber.

Q. What happens if the roof falls down?

A. You remove the roof out of the entry.

Q. You remove the what?

A. The roof out of the entry of the tunnel.

Q. I mean if you did not leave these pillars what would happen to the mine?

A. The roof would come down.

Q. Would it then be a workable mine?

A. No, sir.

[fol. 745] By Mr. Merrell:

Q. Now you testified yesterday that you could not let these mines run together because it would be unsafe and disturb your ventilation. I notice here that mine number six, which has been identified by you as the Kyva mine, has run into mine number seven. Do you know why those two mines ran together?

A. No, sir.

Q. You don't?

A. Just drove them together.

Q. Who drove them together?

A. I don't remember, but Kyva Coal Company I think bought out the other mine. When, I don't know.

Q. This was a mine that belonged to Sampey Lester, was it not?

A. I think he started the mine.

The Court: It is number seven you are talking about?

Mr. Merrell: Number seven.

By Mr. Merrell:

Q. And the Kyva Mine bought out Sampey Lester's mine, is that not right?

A. Yes, sir.

Q. And then they were permitted to run into Sampey [fol. 746] Lester's mine and mine it as one mine, were they not?

A. I think they did, yes.

Q. Now if you can recall, who was operating in mine number nine at the time this map was made?

A. Sherman Meadows.

Q. And mine number eight?

A. That is Sherman Meadows.

Q. Now I ask you to identify this little line that is marked A, starting at the left of mine number eight. Can you see it, Mr. Belcher?

A. Yes, sir.

Q. The line that runs down past mine number seven, turns and runs on over here.

The Court: Westerly direction.

By Mr. Merrell:

Q. Westerly direction, and then turns right and runs in the direction of the McNeil property. What is that line?

A. That was a line to leave a barrier between mines.

Q. In other words, there was the barrier between Mr. Meadows' two mines on the right and mine number seven and mine number six and mine number five, is that not right? They were to run up to this line?

A. If they could get there, yes.

Q. But they had the right to go to that line if they could get there?

[fol. 747] A. Or further.

Q. I thought you said it was a barrier.

A. Well, if the other man pulled out then the barrier would be shifted to some other place.

Q. If the other man pulled out like Mr. Lester did over there the barrier might be shifted, right?

A. That's right.

Q. Now the number six has been identified as the Kyva mine, number five as the Standard Smokeless mine. Now I take you over to the left side of the map, and there are some workings here indicating Bare Ridge Coal Company, and they are driving in a northeasterly direction, are they not?

A. Yes, sir.

Q. And this dotted line A was a barrier for them also, was it not?

A. If they could drive that far, yes, sir.

Q. If they could drive that far they could get the coal up to that barrier, could they not?

A. Yes, sir.

Q. And Meadows driving this way could also drive up to the barrier if he could get the coal?

A. If he could get the coal.

[fol. 753] By Mr. Merrell:

Q. Now I show you a line on the right of the map, right of mine number ten, which is indicated B, and ask you to tell me what that line represents?

A. That was a line put on there to give them so many places to drive over to it.

Q. And then they were supposed to stop at B, is that right?

A. If they could mine it, yes.

Q. If they could get there they could go to B?

A. Or farther, yes.

Q. What do you mean "or farther"? Could they go farther than B if this other man was still working?



A. Well, it would depend on the amount of coal they would mine.

[fol. 754] Q. Is anyone working in either of these mines at this time, and if you want to check the dates, do so. I am referring to mine number ten and mine number eleven. Was anyone working in these mines at the time this map was made?

A. No, sir, not to my knowledge they were not.

Q. Are you acquainted with the fact that the Far West Coal Company purchased mine number eight and nine which were operated by Sherman Meadows?

A. Yes, sir.

Q. They did purchase them?

A. Yes, sir.

Q. Now after they purchased mine eight and nine did they later obtain the right to mine the coal clear to the boundary line marked—no, clear to the line marked E on the extreme right of this map?

A. No, sir, because there is no coal at this property line.

Q. That is because the outcrop does not go to the property line, isn't that correct?

A. That's right.

Q. Actually you are out in the air up here, are you not?

A. Yes.

Q. But did they obtain the right to mine coal all the way to the outcrop?

A. They are mining it. I don't know whether they got [fol. 755] any contract to mine or what was the agreement.

Q. You don't know anything about the agreements between the various parties, do you?

A. No, sir.

Q. I refer you to the line which has been identified as A. After Merritts, Far West Coal Company, bought out Meadows did they actually mine all the coal to the right of that line to the property line on the top and the outcrop on the right?

A. They haven't mined it all yet.

Q. But they are mining it?

A. They are mining it.

Q. Is anyone else mining in there?

A. No, sir.



[fol. 757] Q. Now I refer you to mine number seven which is in the extreme right of the map, and ask you if that is the mine which Mr. Sampey Lester operated.

A. Yes, sir.

Q. And across the top there is a line showing mine number eight. What was that line placed there for?

A. To leave a barrier between the mines.

Q. In other words, Mr. Lester could drive to mine number eight line?

A. If he could.

Q. If he could. There was nothing to prevent him from driving that far?

A. No, sir.

Q. I mark an area on petitioner's exhibit for identification—I mark an area there B, which is between mine number seven and mine number six, and I ask you to state what that area marked B represents?

A. That was to be a barrier between the workings.

[fol. 759] Q. Now we come to mine number five, which is the Standard Smokeless mine, is that right?

A. Yes, sir.

Q. Now I mark an area C and would ask you to tell me what that area C represents.

A. That is to be a barrier. If both mines operate.

Q. Barrier between what mines?

A. That is a proposed mine and number five.

Q. Now I will ask you to tell me what an area marked D [fol. 760] is on Petitioner's Exhibit 81.

A. At that particular time that would have been a barrier, too, if both mines operated equally.

Q. Barrier between which mines?

A. That was number six and five.

Q. Number six was Kyva, is that right?

A. Yes, sir.

Q. And number five was Standard Smokeless?

A. Yes, sir.

Q. Did you know that those mines were owned by the same interest?

A. I knew they were connected. I didn't know their interest.

[fol. 763] Q. What was your purpose of talking to the operators?

A. Well, all I talked to them about what about what work they needed done.

Q. And if they needed some work they called you?

A. Yes, if they were behind.

Q. And one of your duties was to see if they were mining in accordance with your mining plans, is that right?

A. On projections, yes.

Q. And you were being paid for inside work by the operators?

A. Yes, sir.

Q. Where did you get your authority to put this barrier C at the place that you did on that map?

A. I just put it on there to equalize the amount of coal.

Q. That each operator got?

A. Well, to let him mine there in case the other men mined up to it.

Q. Mr. Belcher, since I asked you if you had ever dis-  
[fol. 764] cussed this with me in your office have you had a chance to refresh your recollection?

A. It seems that you were down there.

Q. Did you ever tell me that each operator had a designated area that he was entitled to mine in?

A. Not that I recall.

Q. And that occasionally changes were made, when one miner ceased mining that coal company B. obtained advantage or other operators who were mining, that you enlarged their area? Did you ever so state to me?

A. I don't recall, but that is the way we do it.

Q. And also that when a miner, an operator would run into difficulty because of rolls or bad roof conditions that you would enable him to work around the roll?

A. Yes, sir.

Q. And if he could do so in his own area there was no problem, is that right?

A. No, sir.

Q. But if he impinged or intruded on an area that had been laid out to another contractor that it had to be with the consent of the other operator? Did you so state to me?

A. I don't recall.

Q. You wouldn't swear that you didn't so state?

A. No, sir.

[fol. 769]            Redirect examination.

By Mr. Katz:

[fol. 772] The Court: Well, I would like to have it clearly stated by this witness just what did control, if he knows, so that I will know the basis of his answer and whether or not he is qualified to answer this question.

By Mr. Katz:

Q. What did control, Mr. Belcher, who would get the coal, for example, where I have marked with a pencil A at the time these three mines started in in the same general direction?

A. The first mine that got to it first.

The Court: Was it a matter of contract, do you know, Mr. Belcher?

The Witness: No, sir.

Mr. Merrell: What I want to know is the basis for this man's statement.

The Court: Yes, I would like to know, too. It is a little vague just as to what his authority was and where it was derived from.

Mr. Katz: If your Honor please, as he has already testified to, this is a planned mining of the entire area of this coal, all of it, and that is because they are all on the Paragon Jewel leases. Now he has testified that these mines are set up in different locations, all driving toward, of [fol. 773] course, the center of the mountain, and he has testified that he doesn't have to pay any attention to any agreements because he is the one that sets up the projections and the barriers and he is the one that changes them as the mines progress into the center of the mountain.

The Court: He might very well project them on a map, but if there is a contract that says to the contrary his projections may not be valid. That is what I want to find out, as to what the situation was.

Mr. Merrell: There is no showing yet of this man's authority to change them, and he has testified under my cross examination that in these areas I indicated that the man had the right to mine that coal if he could get it.

The Court: Well, of course we have no more foundation for that statement than we have for these statements.

Mr. Merrell: I agree.

The Court: Let me ask the witness a few questions. Mr. Belcher, on whose authority were you making these mining projections?

The Witness: On my own.

The Court: Well, you didn't own the property. You must have had authority or direction from someone who owned the property, or at least was working the property, to make these projections, didn't you?

The Witness: Well, all I was told was Mr. Clyborne [fol. 774] told me when he started the mines he didn't want the coal hogged up, and I put the projections on the map.

The Court: Who told you to put the projections on the map?

The Witness: No one.

The Court: You just acted entirely on your own?

The Witness: That's right.

The Court: Was this a part of your employment?

The Witness: That's right.

The Court: Of employment by whom?

The Witness: I am in business for myself.

The Court: Well, but you were employed by somebody to make projections on these maps, weren't you?

The Witness: That's right, and the state requires you to furnish a map showing a mining system.

The Court: Who was employing you to make these maps and make these projections?

The Witness: Paragon Jewel Coal Company.

The Court: Then were you acting at their direction when you made these projections?

The Witness: No, sir, they didn't tell me how.

The Court: No, but I mean when you made the maps. I know they didn't tell you how. You have testified they didn't tell you how to project them, but were you acting

at their direction when you took these maps and projected [fol. 775] the various mines?

The Witness: Yes, sir. That is our agreement. I was to make the maps and furnish them with maps.

The Court: And you were to lay out and project these mines on their property?

The Witness: Yes, sir.

The Court: Now by whom were you paid for doing that?

The Witness: By the contractors.

The Court: For making these projections?

The Witness: Yes, sir.

The Court: Did they tell you how to project them or who did tell you how to project them?

The Witness: No one. Have some difference in the projections depending on the type of equipment that is put in the mine to mine the coal.

The Court: But you say the contractors were paying you for making these projections?

The Witness: Well, that is part of the engineering inside, is laying out the mine and making the maps.

The Court: Were these oral agreements you had with the contractors or did you have any written employment contracts with the contractors?

The Witness: No, just oral.

The Court: Could they tell you which direction to project [fol. 776] the mine?

The Witness: Well, I don't remember of them ever telling me.

The Court: Did you ever have any disputes with any of them as to your projections of their mines?

The Witness: Not that I recall, no.

The Court: Did you ever have occasion to tell a contractor that he couldn't go any further because somebody else was mining that, so that he had to terminate his mining in a particular mine?

The Witness: Yes, sir, when you get close together you stop them.

The Court: And you had no disagreements with them? They didn't object at all when you said "Well, you have mined as far as you can go"?

The Witness: Not that I recall.

The Court: Did you supply them with other locations to mine when that happened?

The Witness: Well, they would go back to the management and they would give them another location if they mined that one.

The Court: Now you were asked some questions about whether you testified in another case in a certain manner as to what happened when one operator reached a barrier first. As I recall, the questioning was as to whether or not [fol. 777] you had testified about it, and you said you didn't remember. Can you tell me now what happens if one operator reaches one of the barriers that you laid out first?

The Witness: Well, as a usual thing it depends on how much coal he is producing, and we will change these lines and give him more coal.

The Court: Who do you work that out with?

The Witness: Well, if it is a very important decision I go back to the management.

Mr. Merrell: I missed that. You go back where?

The Witness: To the management if it is some very serious change.

The Court: Management—who is management? You mean Paragon?

The Witness: Paragon Jewel Coal.

The Court: Well, supposing it was a serious change, you went back to Paragon Jewel. What happened then?

The Witness: Well, we would work out some system to change it.

The Court: Then after that system was worked out what did you go?

The Witness: Go back and do the engineering accordingly.

The Court: Did you do this engineering in conjunction with the particular contractor who was operating that area? [fol. 778] Did you discuss it with him?

The Witness: Yes, they know—any time we make a change they will always know about it.

The Court: Supposing they disagreed with the change? Did they at any time?

The Witness: Yes, you have some.



The Court: Then what happens if there is a disagreement?

The Witness: They work out something between them.

The Court: Who is "they"?

The Witness: The contractors and the management.

The Court: I think you were also asked some questions about whether you had testified previously about getting the consent of the other contractor if one contractor was going to intrude beyond the barrier on to his area. Did you or did you not attempt to get the consent of the other contractor?

The Witness: There have been some times that they called me in the office and discuss it with me about the change.

The Court: I only want what you know of your own knowledge. Did you enter into any of these discussions?

The Witness: Yes, sir.

The Court: Say contractor A was going to move beyond the barrier between his area and contractor B. Did you [fol. 779] get the consent of contractor B?

The Witness: I don't recall running into that.

The Court: You don't know whether or not it was necessary to get his consent?

The Witness: No, sir.

[fol. 781] By Mr. Katz:

Q. Yes, Mr. Belcher, I asked the question on what did [fol. 782] it depend—what factors did it depend upon as to who would mine the particular coal in the area which we have marked with a pencil A on exhibit 78. In order to refresh your memory as to what we said, I pointed out to you that Bluff Coal Company was driving in the same general direction as the Bare Ridge Coal Company and the Tommy Smokeless Coal Company. All three of them were driving in the same general direction.

Now in the part up here that has no projections on it and nothing else on it which I have marked generally with A, which one of those three could mine, or what would determine which one of those three could mine that coal?

A. Well, as a usual thing it is the first man that gets back to the coal.

Q. It depends upon his ability to mine and get to that coal first?

A. Yes, sir.

Q. And if say Bare Ridge gets to A first do you set up barriers as to where Tommy Smokeless Coal Company would go and Bluff City Coal Company would go?

Mr. Merrell: I object, your Honor. You ruled that he could answer this. Now I don't think he should be permitted to go farther and lead the witness into every little facet of it.

The Court: Well, I think the question was leading, but I will let him answer that one. What we want is what you know, Mr. Belcher.

[fol. 783] By Mr. Katz:

Q. Mr. Belcher, suppose that Bare Ridge got into this A area first that we have marked here. What would happen as to Tommy Smokeless and Bluff City Coal Company? What would you do, if anything?

A. You would leave a barrier between them.

Q. Now throughout the course of the mining from 1951 on up through 1958, and in fact, to the present time, are those barriers always stationary or are they changed?

A. You change them, yes, sir.

[fol. 786] Recross examination.

By Mr. Merrell:

Q. Now you have stated that you made certain projections indicating the coal which the Stillwells would mine?

A. Yes, sir.

Q. And that these projections were changed. Was that [fol. 787] your testimony?

A. Well, there was additions put on and then you change them when you add other projections.

Q. The changes were to add coal, weren't they, rather than to take it away in the Bare Ridge Coal Company case?

A. Well, in the changed projections you just change a different direction of driving.

Q. All right, did the result of your change decrease the coal that was available to the Stilwells to mine within the area of your projections at any time?

A. No.

Q. Now let's take Kyva. You testified as to this one change which enabled them to get over into the Sampey Lester mine number seven on Exhibit 77. Now did you ever make any other change of their projections?

A. Not that I recall changing. I have added to them.

Q. Now with reference to Kyva, Standard Smokeless, Far West, Meadows, and Bare Ridge, the changes in projections always resulted in adding coal to the projected area, did it not?

A. I would say it did.

[fol. 794] The Court: Now did any barrier changes that you made ever decrease the area of coal to be mined by any operator who was actually operating at the time?

[fol. 795] The Witness: Not that I can recall.

[fol. 797] C. B. BELCHER resumed the stand and testified further as follows:

Further redirect examination.

By Mr. Katz:

Q. Mr. Belcher, you have been asked the question concerning the barrier between two mines and the effect that a change of projections and a change of barrier would make on two coal mines that would be operating side by side.

I would draw on a sheet of blank yellow paper here two openings which we will call mine A and another opening which we will call mine B.

Now assuming that both of these mines were driving in the same direction—that is, toward the letter C which I have marked—in what direction would you make your pro-

[fol. 798] jections? Would you show how the mine would go?

A. It goes straight back in the mountain.

Q. All right, and you have now drawn it on B. Now where would the barrier be placed between A and B?

A. Usually it is right straight between them.

Q. Now what is the purpose of this barrier as between mine A and mine B?

A. That is to keep them from cutting together.

Q. Now, Mr. Belcher, for the purposes of this example assume that while mine A has gotten to the point that I have marked with the dotted line, mine B is able to go up to this limit line. Now draw that B as if it were going up to the barrier.

The Court: In dotted lines.

By Mr. Katz:

Q. Draw a dotted line showing its going to the barrier. Now assuming then that B by its mining methods was able to reach this barrier at the same time that A had only gotten up to its dotted lines, what would you do with respect to mine B insofar as the barrier is concerned?

A. I would change it and let the projections extend on over.

Q. And would then mine B be able to mine across that barrier?

A. Yes, by changing the projections to keep them from [fol. 799] cutting together.

Q. In other words, as to A, you would then change the projections of A so it would go parallel with B, is that correct?

A. Yes, sir.

Q. Where would the barrier then be changed between mine A and mine B?

A. You would change it between them.

Q. Like that?

A. Yes, sir.

Q. And that is the way all of these mines are planned, is that correct?

A. Yes, sir.

Mr. Katz: At this time, your Honor, we would like to introduce this as Petitioner's exhibit—

The Clerk: 82 for identification.

Mr. Katz: 82 for identification.

(The document referred to was marked for identification as Petitioner's Exhibit No. 82.)

Mr. Merrell: I would like to object. I would like to have an opportunity to ask him one question.

The Court: All right.

Mr. Merrell: Would you state with reference to the operators that have been mentioned here one situation in which the barrier was changed as you have diagramed it on [fol. 800] that exhibit 82?

The Witness: I don't remember any in those particular mines.

Mr. Merrell: It has no application to what we are talking about.

The Court: If it hasn't any application—of course, my question was has the barrier ever decreased the projected area of an operator who was actually operating in that mine B at the time. He said no.

[fol. 804] The Court: Mr. Belcher, have your basic mine maps which show projections so far as you have gone to date ever run into a situation just as has been described here and about which you have been asked questions?

The Witness: Yes, we have changed the projections and then changed the barrier between them.

The Court: In the same manner as you have described on this yellow sheet of paper?

The Witness: Yes, sir, in a similar manner, too.

The Court: Similar manner?

The Witness: Yes, sir.

The Court: Can you tell us in what area this occurred [fol. 805] or in whose mine?

The Witness: Well, I have changed them in Stilwell's and then in a short mine, a Streets' mine.



The Court: In the Stilwell situation was there anybody operating on the other side of the barrier when you pierced the barrier for Stilwell?

The Witness: Well, the other mines had stopped.

The Court: Well, that is what I mean. There is a little different situation. Have you ever had the situation where two adjacent mines heading in the same direction with the same barrier shown by a line in between them where one simply reaches a barrier before the other and then you pierce the barrier to permit that company to go on through while the other company is still operating?

The Witness: Yes, sir. There is Standard Smokeless Coal Company. We changed that, but it is practically the same situation as I just said. The other mines stopped.

[fol. 806] Further recross examination.

By Mr. Merrell:

Q. I want to ask you one question, Mr. Belcher. I am referring to the operators involved here—that is, the Standard Smokeless, Sally Mining Company, Merritts, Kyva, Far West, and Bare Ridge. Did you ever change the projections so as to cause the coal that they would have mined under the original projections to be decreased?

Mr. Katz: We object to the term “decreased.” As we have said, it requires the assumption first that there is a specific boundary or area of coal before you can increase or decrease something. There must be a fixed amount.

Mr. Merrell: You use the word “projected area.”

The Court: Yes, I think we ought to understand what the question is directed to. It is simply a projection made on the map. Whether or not that is tantamount to an allocated area or not we are not concerned with right here.



By Mr. Merrell:

Q. Do you understand the question?

A. Not exactly.

Q. I will try and state it again. With reference to the operators that I named, did you ever change your projection so that the coal that they would have mined under the original projections was not to be mined under the new projections? Is that more confusing than the other one?

A. Yes, that's worse.

Q. All right. Now first under your projections there was an area of coal within the projected area, was there not?

A. Yes, sir.

Q. Which if the contractors had followed the projected area they would have obtained, is that correct?

A. Yes, sir.

Q. Now did you ever with reference to the operators I named change the projections in a way that would cause them to lose coal that they would have mined under the original projections before they were changed?

A. No, sir.

[fol. 808] J. L. WORRELL was recalled as a witness on behalf of petitioner [Paragon] and, having been previously duly sworn, testified as follows:

[fol. 810] Cross examination.

By Mr. Merrell:

[fol. 812] Q. Now these tax returns agree with the books of the Paragon Jewel Coal Corporation?

A. Yes, sir.

Q. Did you make an audit of those books?

A. I have never made a complete audit. I have made more or less a test check.

Q. Test check to make sure they agree with the books?

[fol. 813] A. That's right.

Q. Now are there any items of expenditure that you know of with reference to the Paragon Jewel properties—I am speaking specifically of the McNeil and Brown tracts—that are not included in the Paragon Jewel books?

A. None that I know of. They are on the return here some place.

Q. They are all on the return somewhere?

A. Yes, sir.

Q. And are there any items of expenditures that are not deducted either as an expense, as an amortization of mine development, or as a depreciable item?

A. Yes, sir.

Q. What is that?

A. Well, there is federal income taxes, life insurance premiums on the lives of officers not deducted.

Q. Federal income taxes are not deducted and the life insurance premiums on the lives of officers?

A. That's right, for that particular year, 1954.

Q. Can you think of any other items? Can you see any other items?

A. No, no other items in the way of deductions.

Q. Do you know whether Paragon Jewel actually paid any minimum royalty or not on the ground of the McNeil tract?

A. As I recall, they did.

[fol. 814] Q. Wasn't that really a prepayment of it?

A. It is a prepayment, but under the requirements of the lease they prepay it, and I think it has all been recouped.

Q. It was prepaid and then all of it recouped?

A. Either in that year or maybe two years succeeding.

WILLIAM CULBERTSON, JR. was called as a witness on behalf of the petitioner [Paragon], and, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Gillespie:

[fol. 817] Q. Now did you discuss with Mr. Grogan just what he would expect you to do?

A. Yes, sir.

Q. Just tell the Court what you were to do in the arrangement that you entered into in order to mine that coal.

A. Well, he showed me the place where it was faced up with a bulldozer and told me how much he was paying for the coal, and I just started off and started to work.

Q. Well, what was agreed upon as to who was to furnish the equipment to mine with?

A. Well, I was to furnish the equipment to mine with. All the mining equipment I had to furnish.

Q. Who was to furnish the labor?

A. I had to furnish the labor.

Q. Who was to provide the compensation and insurance?

A. I had to provide those also.

Q. Now when he took you to this place where the coal had been faced up did he show you how far to the right or to the left you were to mine?

A. No, sir.

Q. Did he tell you how far forward you were to mine?

A. No, sir.

Q. Mr. Culbertson, after you mined this coal what were you to do with it?

[fol. 818] A. The coal had to be delivered to the tipple of Paragon Jewel Coal Company.

Q. And when did you become entitled to compensation for mining this coal?

A. When pay day came after the coal was delivered to their preparation plant.

Q. And how often did those pay days come at that time?

A. Twice a month I think.

Q. Now what did you have to do in order to be entitled to your money?

A. Well, I had to deliver the coal to the preparation plant of Paragon Jewel Coal Company.

Q. Was there anything else you had to do?

A. No, sir.

Q. Do you know what Paragon did with the coal or what it was to receive for the coal?

A. No, sir.

Q. Did you know what you were going to receive for each load of coal that you delivered to that tippie?

A. Yes, sir.

Q. Have you continued to mine there on that property ever since that time, Mr. Culbertson?

A. Yes, sir.

Q. During that period of time has the price which you have been paid for mining that coal been changed?

[fol. 819] A. Yes, it has.

Q. Has that price change ever affected any coal which you had already mined and delivered to the tippie?

A. Well, when the price changed we were notified, any changes either up or down.

Q. Well, would you be notified before you mined the coal or afterwards?

A. Before we mined the coal.

Q. Did you agree to mine any particular boundary of coal, Mr. Culbertson?

A. No, sir.

Q. What was your agreement as to how long this mining would continue on your part?

A. Well, there wasn't any limitations as far as the period of mining.

Q. What was your understanding about how the agreement would be terminated, Mr. Culbertson?

A. Either side could terminate the agreement at any time.

[fol. 821]

Cross examination.

By Mr. Merrell:

Q. Are you mining coal for them now?

A. Yes, sir.

Q. Under your present arrangement can they terminate you?

A. Yes, sir.

Q. You have borrowed large sums of money from Paragon Jewel over the years, haven't you?

A. Quite a bit.

Q. Do you actually mine the coal?

A. No, sir.

Q. You subcontract it?

A. Yes.

Q. You take an override in the middle down?

A. Yes.

Q. And your situation isn't the same as the Stilwells, is it?

A. No.

[fol. 822] Q. What do you do?

A. I contract to Paragon Jewel and subcontract.

Q. How many subcontractors do you have?

A. Well, I have had nine at one time.

Q. And what do you get for your services?

A. Well, it is predicated on how much coal you put in, so on and so forth.

Q. You get a tonnage override, is that it?

A. Yes, sir.

[fol. 823] Q. Now you said you always knew what price you would get for a ton of coal when you put it in the tipple. Do you always know what you are going to get for the coal that has not yet been mined by you or by your subcontractors?

A. Well, we know the price that they are paying. If there is any changes made in price structure either up or down we are notified a week previous to that.

Q. So every time you deliver a ton you get a fixed override?

A. Yes, sir.

Q. And if there is any change in price paid by Paragon from period to period that is borne by the contractor, is [fol. 824] that right?

A. That's right.

Q. Either gets the benefit or suffers the disadvantage of a price change?

A. That's right.

Q. Your override is fixed?

A. That's right.

Q. Now isn't it true that you actually contracted for a certain acreage when you dealt with Mr. Grogan?

A. No. There were several acres involved, two or three different tracts of coal.

Q. There was a specific area, but you don't know how many acres?

A. No, sir, it was a general area.

Q. Did you know the bounds of this general area?

A. No, sir.

Q. Could you have ascertained the bounds of this general area if you had so desired?

A. Well, I didn't know anything about that. That is left up to Paragon Jewel about the maps and engineering. They just gave me a place to put in.

[fol. 825] Q. Now at the time you talked with Mr. Grogan the Paragon operation was getting under way then, was it not?

A. Yes, sir.

Q. And Paragon Jewel was looking for coal that they could sell, weren't they?

[fol. 826] A. Yes, sir.

Q. And did Mr. Grogan encourage you to start this operation?

A. Well, he just took me up there and showed it to me.

Q. Was he desirous that you start the operation?

A. Yes, they were anxious to put contractors in.

Q. Did he ask you how much equipment you were able to put into the job?

A. He knew I had a lot of equipment.

Q. He knew you had a lot of equipment?

A. Yes, sir.

Q. And he wanted you to move into the job?

A. Yes, sir.



Q. And get subcontractors to do the work?

A. Yes, sir.

Q. And was one of his methods of encouraging you to tell you that you can move into the job but we want the right to kick you-out any time?

A. That was the agreement, the privilege.

Q. I am not asking you what the agreement was. I am asking you what he said.

A. Well, either side had a right to terminate any time they wanted to.

Q. How do you know either side had the right to terminate any time they wanted to?

[fol. 827] A. Well, when we went in there and took a lease, if you run out of coal or something you could quit, or if they say that your ash is running too high in the coal you could quit. So either side could do what they wanted to.

Q. If you run out of coal you could quit or if you were mining bad coal then you had to either produce merchantable coal or quit, isn't that right?

A. Yes, sir.

Q. But as long as the operation was being mined properly and you were producing merchantable coal there was nothing said about quitting, was there?

A. No.

Q. The fact is that when you started on that job you weren't thinking in terms of quitting, were you?

A. No, I was looking forward to making some money.

Q. Sure. You wouldn't have moved your equipment in there, would you?

A. That's right.

The Court: I assume that you had no written contracts with Paragon Jewel?

The Witness: That's right.

The Court: They were all oral?

The Witness: Yes.

The Court: Did you have any written contracts with any of your subcontractors?

[fol. 828] The Witness: No, sir.

The Court: All right.

By Mr. Merrell:

Q. Mr. Culbertson, during the years '54, '5, and '6 did you claim percentage depletion on your operation with Paragon Jewel?

A. I don't think so.

Q. Did you in 1953?

A. I might have or might not.

Q. You just don't know?

A. No, sir, I don't know.

Q. But as far as you knew there was nothing to prevent you from claiming it, is that right?

A. At that time, '52 or '53, I guess that's right.

Q. Nobody told you you can't claim it?

A. Not at that time.

Q. It was quite a little later they told you you couldn't claim it, wasn't it?

A. I think it was after Mr. Woods came to Paragon Jewel, '54, '55.

Q. While Mr. Grogan was there there was nothing said about it?

A. Not when we first started up, that's right.

[fol. 836] WALTER SIMMONS was recalled as a witness on behalf of the petitioners, [Paragon] and, having been previously duly sworn, testified as follows:

[fol. 841] Cross examination.

By Mr. Merrell:

[fol. 843] Q. Did the price that you received for your coal vary during the period?

A. Yes, sir, up and down.

Q. It would go up and down?

A. Yes.

Q. And that was generally in accordance with the changes in market price for coal, was it not?

A. I don't know. In other words—I guess it was. They would come and tell us we have to cut you, or they would raise you. Market picked up I imagine.

Q. When they came and told you they had to cut you didn't you ask why?

A. Well, I don't know as I did. Being in the coal fields you usually knew when it was up and down.

[fol. 844] Q. Weren't you concerned at the fact that you were getting cut?

A. Was I—why, sure. Anybody would be concerned, but not much you can do about it I don't think.

Q. You knew from your knowledge of the general market of coal that the price was depressed, didn't you?

A. That's right.

Q. And so you would have to take a cut?

A. That's right.

Q. And then you became elated when they would increase the price of coal?

A. Of course you would feel better when you get more money, if that is what you are driving at..

Q. That was generally in accordance with a general increase in the market price of coal, was it not?

A. Well, I don't know. In other words, I would say that when they got more money for it he come along and give you more. I don't know what they done with it.

Q. You weren't quite as concerned with the reason for the increase as you were the reason for the decrease, I guess?

A. Well, of course you like to increase, but in the coal fields you usually have to go whichever way it goes I imagine.

Q. When the price in the coal fields goes down everybody [fol. 845] is hurting, aren't they?

A. That's right.

Q. Even a Cadillac dealer?

A. Even a Cadillac dealer.

[fol. 848] FRANK H. WOODS was called as a witness on behalf of the petitioner [Paragon], and, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Katz:

Q. Mr. Woods, what is your occupation?

A. I am the treasurer and general manager of Paragon Jewel Coal Company.

Q. How long have you been with the Paragon Jewel Coal Company?

A. Since February 1, 1952.

Q. And at the time you came with Paragon Jewel Coal Company what was your position?

A. Treasurer.

Q. At that time was there a Mr. Grogan also employed by the Paragon Jewel Coal Company?

A. Yes, sir.

Q. What was his full name?

A. L. P. Grogan.

Q. And what was his position?

A. He was the superintendent.

[fol. 849] Q. By superintendent, what did he superintend?

A. He superintended the construction of the roads, power lines, general operation of our processing plant and tippie at Whitewood, Virginia.

Q. Now did you have any other position besides that of treasurer while Mr. Grogan was the general superintendent?

A. Well, I assisted Mr. Grogan, yes, sir. I spent two to three days a week with him.

Q. Now are you familiar with the contracts that were made by Paragon Jewel Coal Company with its various contractors?

A. Yes, sir.

Q. During the time that Mr. Grogan was general superintendent who negotiated these agreements with the miners?

A. Mr. Grogan.

[fol. 853] The Court: Well, I think you better limit your testimony to what provisions the company as a policy matter put into their contracts, not necessarily provisions, but what it was the policy of the company to do and what it was to require the contractor to do.

The Witness: That is what I had started to say.

The Court: You were talking about "we told", and I think that is the basis of Mr. Merrell's objection because that would mean you were telling one of these contractors.

The Witness: Oh, I see, yes, sir.

By Mr. Katz:

Q. Well, now explain the policy without—

A. It was the policy of the company to build the roads, to maintain the roads. We built the power lines. We had power available for the contractors if they wanted it. Some of them preferred to put in diesel plants. It was at their option. We didn't force it. We provided engineering service for them, but for that engineering service they were charged five cents a ton.

We paid them—at that time it was every week, but that has changed at different times—for the coal. We never changed the price of coal unless they were notified at least two or three days in advance. Whenever any coal was delivered we wouldn't go back on them and say "the coal [fol. 854] delivered Friday, the price was reduced to 25 cents." They always knew in advance any increase or reduction in the price of coal.

They were told that they could bring their equipment in there, any time they wanted to they could leave, any time that we wanted to move you out we can tell you to leave.

They were told that on the equipment, all their equipment they brought in they could take their depreciation on all that. On the coal we claimed depletion.

The question came up why don't we get this. I said "we own the coal in place. You are only in here mining it for us. In other words, we are paying you for mining our coal."

[fol. 857] By Mr. Katz:

Q. I will ask you, Mr. Woods, what was the policy of the company with respect to the delivery of the coal from the mines of the independent contractors to the tippie of Paragon Jewel. What was your policy with respect to the delivery of that coal?

A. We required all of the coal to be delivered to our [fol. 858] tippie.

Q. Now at the time that this coal was delivered when did the contractors become entitled to receive their compensation for mining that coal?

A. As soon as the coal was weighed on our scales and dumped into our bins.

Q. Were the contractors required to take any loss in the event that Paragon Jewel Coal Company sold this coal at a loss?

A. No, sir, the contractors never knew what we received for our coal.

Q. As a matter of fact, Mr. Woods, would it even be possible for the contractors to know what price or what amount that Paragon Jewel received for the coal?

Mr. Merrell: I object. I think it would be possible.

Mr. Katz: Well, we want to see. Let him answer and then we will see. In other words, the coal is not in the same form when it is sold, your Honor.

The Court: What is the ground for your objection?

Mr. Merrell: I will withdraw it.

The Court: You may answer the question.

The Witness: It would be possible for them to know, but we never advised them. They may have various means to find it out from someone we were selling coal to or something like that, but we never discussed our prices with [fol. 859] them.



By Mr. Katz:

Q. Is the coal, Mr. Woods, that the contractors delivered to your tipple in the same form when it leaves your tipple as it was when it came to the tipple?

A. No, sir.

Q. Well, what happens at the tipple to that coal?

A. The raw coal or run of mine coal, we speak of it, as it comes out of the mine is dumped into the tipple, through a series of separations and washings, sizing and grading, oil treating. When it comes out there are four different grades of coal. It goes in, it is all mingled together. A lot of times there are rock, impurities, sticks, stone, pieces of steel wire and everything in there. That is removed before the coal is loaded in the railroad car.

Q. Do all four of those qualities or sizes of coal receive the same price on the commercial market that you sell to?

A. No, sir.

Q. Who did the contractors look to for the payment of their compensation for mining of that coal?

A. They looked to Paragon Jewel Coal Company.

Q. And did they ever look to anyone else?

A. Not that I know of, no, sir.

Q. How often does the price on the commercial market [fol. 860] change in respect to coal, Mr. Woods?

A. Every day.

Q. In other words, it changes all the time?

A. Yes, sir.

The Court: Does Paragon Jewel sell any of its coal under contract?

The Witness: Sir, I really couldn't answer that. John McCall Coal Company is—they sell the coal for us. I am not too familiar with the details of the sales of it. I know the prices we receive.

The Court: You don't have any fixed contract price for the sale, do you?

The Witness: No, sir.

By Mr. Katz:

Q. Mr. Woods, there has been introduced in evidence petitioner's exhibit number 74, which shows that the amount per ton paid by Paragon Jewel to Bare Ridge Coal Company from November of '51 to September 30, 1957 changed nine times in six years. I will ask you whether or not the price per ton of coal that Paragon Jewel sells on the commercial market has changes more or less often than that.

A. Roughly I would say it probably had changed 900 times. We had three or four price changes in one day. In other words, your price range may vary as much as 35 or 40 cents on one grade of coal in a day, and sometimes four [fol. 861] grades of coal, why, there is no limitation to what you—

Q. I will ask you then whether or not the changes in the amounts paid to the contractors are directly connected with the price which you receive per ton on the commercial market.

A. Not directly, no, sir.

Q. Now did you ever make any contracts or discuss any agreements with the Merritts?

A. No, Mr. Grogan negotiated the agreement with the Merritts.

Q. Now at the time that the Merritts bought out the Meadows mine did you have any discussions with them?

A. Well, at that time they had been on our property so long that we didn't go into the details of all of the agreement because they started there in 1953. We did, how- [fol. 862] ever, approve the transfer of the Meadows leaving and the Merritt boys moving in.

Q. Well, will you please explain to the Court what happened with respect to the Merritt-Meadows transaction?

A. Yes, sir.

Mr. Merrell: He can testify as to things he has firsthand knowledge of.

By Mr. Katz:

Q. Yes, the things you know personally.

A. Sherman Meadows, the operator of Meadows Coal Company, came to see me, said he had an opportunity

to go in business over at Swords Creek, Virginia, that he thought he could do better than he was doing on our property, that if I find someone who will buy my equipment outside is it all right with you if I sell out. I said "Sherman, if you trade with someone who we approve of that is perfectly all right."

Well, on one Sunday afternoon I would say between 3 and 4 o'clock, I believe it was, Mr. Lee Merritt called me and said he had been talking to Sherman and they had tentatively arrived at an agreement to take over his operation.

Q. What was the name of the operation?

A. The name of the operation was Meadows Coal Company.

Q. And what year was that?

A. That was in 1956, I think the first part of November. [fol. 863] Q. All right, sir.

A. And asked me, said "before we close this up will you let us mine the coal?" I says "Lee, you go ahead and close your transaction. As far as I am concerned you can mine the coal, but I would like to see you the next time I come down to the mine."

Well, I don't know whether it was Wednesday, Tuesday, but the next trip that was down there he came to see me and said that he had closed the transaction. That was the extent of it.

Q. Now is that, then, all that took place between you and Mr. Merritt and Mr. Meadows with respect to this transaction?

A. Yes, sir, that is about all.

[fol. 869] Q. Well, will you please explain to the Court whether or not these men had any particular area of coal which they could mine?

A. No, sir, they did not.

Q. Well, explain how they were to proceed with the mining of the coal?

A. They were to proceed with the mining of the coal the way we projected the mines. I say we—the engineer, the coordination of the engineer and the company, dependent on their ability, how much equipment that

they had, what the conditions were inside, they mined in whichever direction we wanted them to mine in. As they got in we would give them a little bit more area, a little more territory. They could have 6 working places, 10, 12. When they start you never know whether a man is going to be say—we classify them as the major leaguer or minor, whether he is going to be a minor leaguer or major leaguer. These boys are all major leaguers.

Q. Well, by a major leaguer then what were they able to do that a so-called minor leaguer couldn't do?

A. Well, they knew a lot more about coal mining than some of them we had. Some of these boys came with us may have been employed somewhere else. That was their first experience, adventure in that kind of business, and they found out it wasn't as easy to do as they thought it was. They stayed a few weeks or months and left.

[fol. 882] Q. Now what is the purpose of Paragon Jewel in setting up the mining system as you have just testified to? What is the reason for that method of setting up the system?

A. Well, the reason for setting up the system is we want to get all the coal we can get out of the leases that we have. On some of our leases we are required to recover 85 percent of the merchantable amount of coal or we pay royalty for it if we don't mine it, and with careless operation if you just turn some of them loose in there and let them go in where they want to you would have hundreds and hundreds of thousands of coal that would be messed up that you couldn't recover.

Q. And if you couldn't recover that so-called messed up coal what would happen with respect to Paragon Jewel and its obligation under its leases?

A. We would pay royalty on coal that we never were able to mine.

Q. What is the amount of coal, percentage of coal that you have to mine from these leases, Mr. Woods?

A. Well, on the Brown number one lease at least 85 percent, and I am not positive—I would have to look at the McNeil lease to see what the exact percentage is.

[fol. 885] Q. Mr. Woods, has Paragon Jewel ever had to shut down its tipples?

A. Yes, sir.

Q. Will you please explain the reason for it?

A. Well, the reasons, sometimes we couldn't get railroad cars, repairs, something took a day or two to complete, or lack of business.

Q. What is the longest time that you have ever had to keep the tipples shut down?

A. At any one special time I think a week is the longest.

Q. Now during the time that your tipples is shut down what do the miners do?

A. Well, they either don't work or some of them—they will work and run enough coal to fill up their storage facilities, the cars, bins, and so forth, or they don't do anything.

Q. Now even though Paragon Jewel is unable to take the coal at their tipples can these contract miners sell that coal to anyone else?

A. No, sir.

Mr. Merrell: I would like to move to strike that. There is a point here, actually whether these contractors can take the coal elsewhere has never arisen. Paragon Jewel has always agreed it has taken all the coal that they can produce.

The Court: Getting into whether or not they have the right to do it, whether a particular contractor has a right to do it, I don't believe he is qualified to testify except those he negotiated.

By Mr. Katz:

Q. Let me ask you this. When your tipples was shut down, as you have testified, for a week, did any of these contract miners take that coal to any other tipples and dispose of it?

A. No, sir.

Q. What did they do with respect to their own mines?

A. Well, they would maybe do some repair work or some outside work if something had to be done. They could mine

enough coal to fill up what storage capacity they had until [fol. 887] the tippie resumed operation.

Q. What do you mean by storage capacity?

A. Well, their chutes. Most of these mines, on the outside they have chutes. They have their mine cars. They could have all their mine cars loaded, their chutes loaded and their trucks loaded, and the minute the tippie went back into operation they could dump that coal in there, more than we could take for an hour or two to get caught up.

[fol. 889] Cross examination.

By Mr. Merrell:

Q. Did Paragon Jewel always take all the merchantable coal that the operators produced?

A. As far as I know, yes, sir.

Q. You said there was nothing secret about these maps, if the operators asked for one you would give them one?

A. Yes, we give it to them twice a year anyway. We have to.

Q. You are obligated to?

A. Right.

Q. And there is an obligation to have a mine map at the mine operation, is there not?

A. All the time, yes.

Q. That is required by state law?

A. Right.

Q. I believe you also said that at first the outcrop coal is not regarded as merchantable coal, is it?

A. Well, it isn't—outcrop coal is not.

Q. You have to get back in until you get to the good coal?

A. Right. Maybe sometimes 25 feet.

Q. And you have to develop some places so you can work, so you can get a respectable tonnage, do you not?

[fol. 890] A. Right.

Q. Now you mentioned that you would take these men up and they would look at the coal as it was faced up.



A. They would see the coal as it was faced up before they started spending any money.

Q. So they could tell whether they could make any money there or not, wasn't that your answer?

A. They would think so, yes, sir.

Q. Of course they wouldn't know whether they could make any money until they got back in the good coal?

A. No, they knew everybody around them was making some.

Q. But they don't know where the rolls were?

A. No, nobody knows what is under the mountain until you get there.

Q. A vein can change quickly?

A. That's right.

Q. So they wouldn't know until they got in operation whether they could make money or not?

A. Well, they wouldn't be sure.

Q. And in order to produce coal they have to bring their equipment in there, don't they?

A. Yes, sir.

Q. And they have to have a tippie or what you call a chute?

[fol. 891] A. Chute.

Q. To take care of the coal when they bring it out. And if they mine on rails, as the Stilwells did, they have to lay their rails into the mine?

A. Right.

Q. And they have to arrange for their power, do they not?

A. They take the power inside the mine, yes, sir.

Q. Even when you furnish them power they have to convert it from AC current to DC current, do they not?

A. Right.

Q. And set up a substation to do that?

A. Yes, sir.

Q. They also have to watch the roof as they move back in?

A. Yes, sir.

Q. That is why they leave these pillars, is it not?

A. Yes, sir.

Q. And when they pull pillars actually they are pulling back from an area where they have previously mined?

A. That's right.

Q. And they really don't know until they have got themselves established on the property and gotten into the mine a certain distance whether they are going to make any money or not, do they?

[fol. 892] A. They don't know, but they have a general idea.

Q. They hope they will, or they wouldn't start?

A. That's right.

Q. But they don't know. And when you came with Paragon Jewel—I believe it was in February, 1952?

A. Yes, sir.

Q. Paragon Jewel was hurting for coal, wasn't it?

A. Well, we weren't hurting for coal. We were trying to get their production built up.

Q. Well, if you didn't produce it you had to pay your minimum royalty?

A. That's right.

Q. You had this big processing plant that somebody had to pay for, didn't you?

A. Yes, sir.

Q. And you were planning to pay for it out of the coal that was mined from the property?

A. Yes, sir.

Q. And you did, in fact, encourage these miners to make the investment and develop the mine, did you not?

A. Yes, sir, we even advertised for them sometimes.

Q. And one of your main policies was to advise them, as I understand your testimony, that regardless of their situation in that mine you reserved the right to terminate them at any time?

[fol. 893] A. Yes, sir.

Q. That was definite?

A. Yes, sir.

Q. And you made that known to every contractor that you entered into agreement with?

A. I made it known to every one I have entered into agreement with, yes, sir.

Q. Did you make that known to the Sally Mining Company?

A. Yes, sir.

Q. And who did you tell it to?

A. Mr. Lloyd Conley.

Q. And when did you tell it to him?

A. I told it to him on a trip I went with him to look inside the mine. Before he ever acquired that mine he went inside to see what the conditions were. He says "I don't know whether I am going to be able to mine in here or not." Said "this looks pretty bad." I said "Lloyd, if you can't mine it you can quit any time you want to, and at the same time we can run you off any time we want to."

Q. And you knew he was investing in the equipment?

A. Yes, sir.

Q. But when the Merritt brothers bought out the Meadows mine you made no such statement?

A. No, sir. Conley was a new man. He had never operated on our property before. The Merritt boys had been [fol. 894] there four, nearly five years when they bought out the Meadows.

Q. They had only been there a matter of two years.

A. Well, they started in '53. That was '56. Well, two, three years.

Q. The first thing you said was "we want to make it certain we can terminate your arrangement"?

A. Yes, sir.

Q. And also you made it certain that you were to have the depletion?

A. Yes, sir, depletion was discussed.

Q. And you did that with Belcher?

A. I think I did, yes, sir.

Q. But you are not sure?

A. I did that with the mines that Belcher had on our property before Mr. Grogan left us. Well, that would have been all of them because he didn't have any up to that time.

Q. Now who has to obtain the mining permit?

A. The operator. The contractor.

Q. Who is responsible to the state mining authorities?

A. Responsible for what?

Q. The proper operation of the mine.

A. The mine foreman and the owners of the mine.

Q. That is the operators of the mine?

A. Yes, sir.

[fol. 895] Q. And if anything is wrong in their mine they go to the state authorities, go to them, do they not?

A. Yes, sir, they go to them first.

Q. When the Merritt brothers bought out the Meadows mine and you were discussing it with them do you recall telling them that they had the largest single block of coal that Paragon Jewel had left on its property?

A. No, sir.

Q. Do you recall later after they bought it out in November, 1956, as I recall your testimony, and right after the first of the year a map was issued to them and this map did not accord with their understanding of the area that Mr. Meadows had, do you recall their raising the question with you?

A. I can't recall that specific instance. I know there have been a lot of disagreements as to take 30, 40 people on the job. I can't remember—

Q. You can't recall their coming to you and saying "we understood from Mr. Meadows that we had a larger territory than is shown on this map"?

A. No, they saw Mr. Meadows' map. They saw what his map was before they ever brought it over.

Q. How do you know that?

A. They were right next door to him.

Q. How do you know they saw it?

[fol. 896] A. I would certainly think before they put out any money they would see that. He told me they had agreed.

Q. They should have known from Mr. Meadows' map what they were acquiring, shouldn't they?

A. I would think so. I don't know.

Q. They thought they did. But the map after the first of the year was different than the map they saw from Mr. Meadows. That is why they raised the question, as I understand.

A. I really don't know, sir.

Q. You don't recall anything about it?

A. I really don't know, sir.

Q. But you are not saying under oath that it did not happen?

A. No, I am not saying it did not happen. I am not saying it did happen. I say I do not remember the particular instance you are speaking of.

Q. Now you said that when the operators delivered a ton of coal to your tippie they had a right to be paid, is that correct?

A. State that again.

Q. When the contractors delivered a ton of coal to your tippie they had a right to be paid?

A. Right.

Q. Did they have a right to be paid anything before they delivered a ton of coal to your tippie?

[fol. 897] A. No.

Q. The price was based on the coal being put in your tippie?

A. Right.

Q. And they knew at that time what they would get for the ton of coal they were putting in your tippie?

A. Right.

Q. Did they know at that time what they would get for the ton of coal they would put in your tippie next week?

A. They knew that the price stayed the same until they were given notice. In other words, we gave them notice at least two to three days ahead, so they knew that—let me—

Q. Excuse me.

A. Let me state it this way. They always knew the price they would receive for the coal when they delivered it to our plant.

Q. Now would you answer my question, Mr. Woods, which was did they know what they would receive for the coal which they would deliver to your tippie two weeks from that day?

A. I don't understand you. Let me ask you this.

Q. No, I am asking the questions. You don't understand it?

A. No, sir, not yet.

The Court: Talking about unmined coal.

[fol. 898] By Mr. Merrell:

Q. Unmined coal. Did they know what they would receive for unmined coal?

A. No. No, they didn't.

Q. Now when the Merritts first started they were paid a lesser price for the coal that they produced than the other contractors, is that not right?

A. I believe for a week or two they were shooting coal on the solid before it was machine cut. All the contractors got a lesser price than they did after they got their machines.

Q. Why do you pay them less for solid shot coal?

A. Solid shot coal, you couldn't get any lump coal in it. It breaks it up like a—

Q. It makes it less desirable from a marketing standpoint?

A. Yes.

[fol. 903] By Mr. Merrell:

Q. How can one of your operators become a productive miner unless he is assured a security in his operations? That is the right to mine for a period of time.

A. He has a right to mine for a period of time unless he does something that is against the way we want the coal mined, unless he decides he wants to take off himself.

Q. You mean if he mines properly and produces coal and complies with the regulations, state and federal, does a good job, that he has a right to stay there?

A. He has a right to stay there, yes.

Q. And mine the coal?

A. And mine the coal.

[fol. 904] Q. Now there has been some discussion regarding this wheelage across the White tract, and when Sally Mining Company went in there were they required to pay wheelage?

A. Yes, sir.

Q. Five cents a ton?

A. Yes, sir.



Q. Did they have an alternative of using a road?

A. At that time I don't know whether they had that alternative or not. The road was there, but we would have had to do some work on it for them to have gotten across.

Q. The road was impassable, was it not?

A. I would say it was at that time, yes, sir.

Q. You had taken a number of culverts out, had you not?  
[fol. 905] A. Well, I don't know just exactly everything was done, but I would say the road was not in a condition to haul over.

Q. The deal was put to the Sally Mining Company on the basis of five cents a ton wheelage without any alternative, isn't that right?

A. That's right. He knew that before he started, yes, sir.

Q. He knew he would have to pay five cents for wheelage before he started?

A. Yes, sir.

[fol. 908] Q. Does Paragon Jewel have an exclusive contract with the John McCall Company to handle their coal?

A. Yes, sir.

Q. They sell all your coal?

A. Yes, sir.

Q. What do they do at that time—

A. Sold to them f.o.b. tippie.

Q. The contractors bring it in, you process it, dump it into railroad cars, and John McCall takes it from there?

A. Right.

Q. On this conference you referred to about six months ago when the Stilwells and the Merritts and you and your engineer got together you said they could hear each other blasting, is that right?

A. Yes, sir.

Q. These engineering projections are not always completely accurate, are they?

A. No, sir. There is always a possibility that there might be a mistake there. I don't say the maps are a hundred percent accurate. In fact, they have proven to be wrong on occasion.

Q. Occasionally a man might run into a mine when he thinks he is a distance away from it?

A. Yes, sir.

Q. And it was your testimony you discussed this for a [fol. 909] matter of a half hour and reached an agreement as to who—

A. Something like that, yes, sir. I don't remember exactly.

Q. And an agreement was reached by the parties thereto as to who would mine the coal, is that right?

A. Yes, sir. And a year and a half ago we had another one that said we would wait until things get a little closer and then we will check again. So this last meeting was a result of that, and I think Mr. Merritt started pulling the pillars right after that.

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Redirect examination.

By Mr. Katz:

Q. Mr. Woods, Mr. Merrell has asked you whether or not the contractors aren't taking a big risk in investing their money in this equipment without knowing whether or not they are going to make any money in mining. I will ask you whether or not Paragon Jewel Coal Company with its investment in its tipple can make any money if the miners can't get the coal out.

A. No, sir.

Q. Can you make any money then if the miners can't get the coal out?

A. No, sir.

[fol. 910] Q. Mr. Merrell has also asked you whether or not the contractors knew the price they would get for unmined coal. Were any contractors at any time required to mine unmined coal if they did not want to?

A. No, sir.

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[fol. 917] C. W. STILWELL was called as a witness on behalf of petitioner [Merritt], and, having been first duly sworn, testified as follows:

The Clerk: Will you state your name and address for [fol. 918] the record?

The Witness: C. W. Stilwell, Raven, Virginia.

Direct examination.

By Mr. Merrell:

- Q. State your occupation.  
 A. Coal miner.  
 Q. What kind of mining do you do?  
 A. We operate a coal truck mine.  
 Q. Is that strip or underground mining?  
 A. Underground.  
 Q. How long have you been engaged in coal mining?  
 A. About 26 years I have operated the mine.  
 Q. When was the Bare Ridge Coal Company organized?  
 A. In '46.  
 Q. Is it a partnership?  
 A. Yes, sir.  
 Q. Who is the other partner?  
 A. That is my brother, S. W. Stilwell.  
 Q. What is the interest of each of you?  
 A. 50-50.  
 Q. What was the first job of Bare Ridge Coal Company?  
 A. Consumer's Mining Corporation.  
 Q. What did you do for them?  
 A. We mined coal the same way we are now.  
 Q. Did you mine that job out?  
 [fol. 919] A. Yes, sir, we did.  
 Q. What was the second job?  
 A. Laurel Fork Coal Company.  
 Q. When did you start the Laurel Fork Coal Company job?  
 A. We started in '48.  
 Q. And did you work that job out?  
 A. Yes, sir, we did.

Q. Are you mining coal at the present time?

A. Yes, sir.

Q. On whose lease are you mining coal?

A. Paragon Jewell Coal Corporation.

Q. How long have you mined coal on the property covered by their lease?

A. It will be 10 years this month.

Q. That would be since sometime in 1951?

A. '51.

Q. Are you mining under a written agreement?

A. No, sir.

Q. What kind of an agreement?

A. Just an oral agreement.

Q. Have you operated continuously since 1951?

A. Yes, sir.

Q. Have you ever had any dispute with Paragon Jewell, regarding the agreement?

[fol. 920] A. No, sir.

Q. Who did you negotiate the agreement with?

A. L. P. Grogan.

Q. Whom did Mr. Grogan represent?

A. He was representing Paragon Jewell Coal Corporation.

Q. What was his position with that company, if you know?

A. I understood he was superintendent.

Q. When did you first commence discussing an agreement with Mr. Grogan?

A. Somewhere around July or August in '51.

Q. At that time, did you examine the properties of Paragon Jewell?

A. Yes, sir, we did.

Q. Were there any other operations on the property at that time?

A. No, sir, there wasn't.

Q. Was this on the McNeil tract?

A. Yes, sir, it was.

Q. Tell us what you discussed and what happened when you negotiated with Mr. Grogan.

A. Well, when we contacted Mr. Grogan for our lease, we went to see him and talk to him about the job and he

told us he had to make coal under lease and showed us on [fol. 921] the map the boundary that would be three operations put in that we could have our choice out of either one. He had one of these mines faced up, we went and looked at it and we didn't like it, we didn't think it was a suitable place to mine. We went around in the woods, but so far from it, and located a place what we thought would be a place for good mines and we took a place there on the middle one, we took the middle job.

Q. Was the mine faced up at that time?

A. No, sir, it wasn't.

Q. What did Mr. Grogan tell you with reference to the area of coal involved in the mine that you were taking?

A. Well, he showed us on the map the boundary and he showed us how far back the boundary ran to the McNeil tract, between McNeil's heirs and Brown heirs, and he laid his hands down on the map and said we could go so far to the right and so far to the left, all the way back to the McNeil tract.

Q. Did he indicate to you how far you could go on the right?

A. Yes, sir, he did.

Q. And on the left?

A. Yes, sir.

Q. Was the map submitted to you at that time?

A. Nothing but the boundary lines on the McNeil lease. [fol. 922] Q. And after you negotiated with Mr. Grogan, did you commence operations?

A. Yes, sir, after we negotiated with him, and leased the boundary, we started in to open up the mines, set up, built us a tippie, got ready to run coal, and cut under the roof enough to set spads, then Mr. Belcher he come and set us up a map to drive by.

Q. Did this map that Mr. Belcher submitted to you show the boundary of coal that Mr. Grogan had indicated?

A. Yes, sir, it did.

Q. I show you Petitioner's Exhibit for identification Number 80 and ask you if you would identify that? State what it is.

A. Yes, sir, this one right here (indicating)—

Q. (Interposing) No, state what the map is first.

A. Oh, the map, this is the boundary of the part of the McNeil tract of coal, up to this line here (indicating).

Q. Was this map given to you?

A. Mr. Belcher was the one that gave me this map, after we set the mine up.

Q. Mr. Belcher who does the engineering work?

A. Yes, sir.

Mr. Merrell: I would like to offer in evidence now, Petitioner's Exhibit 80, as the map that was given to Mr. Stilwell [fol. 923] at the time he commenced operations on Paragon Jewell property.

The Court: Any objections?

Mr. Katz: No objections.

The Court: Petitioner's Exhibit 80 will be received in evidence.

(The document previously marked for identification as Petitioner's Exhibit 80 was received in evidence.)

By Mr. Merrell:

Q. On Exhibit 80, I am marking a line with the letter "A" in red pencil. Will you tell me what that line represents?

A. That was the boundary line between us and the next tract of coal over here that was laid off for Mr. Henegar of Bliff Coal Company.

Q. Now, I next mark a line "B" and ask if you would tell me what that line represents?

A. Well, that was as far as we could go to the left, on account he was putting another operation on this side, to drive around a small tract of coal here, and he showed us on the map that we could come over that far and stop, drive up to the lease line.

The Court: By "this side", you mean to the left?

The Witness: That was to the left of our operation here.



[fol. 924] By Mr. Merrell:

Q. I make a mark "C", and ask you to identify it?

A. Line between the McNeil and Brown heirs.

Q. You have indicated an area there which is enclosed by lines identified as "A", "B" and "C"?

A. Yes, sir.

Q. Were any representations made to you regarding that area by Paragon Jewell Coal Company at the time you started operations?

A. How is that now?

Mr. Merrell: Will you read that back?

(The reporter read the record as requested.)

The Witness: No, sir.

By Mr. Merrell:

Q. Who was entitled to mine the coal within the area enclosed by lines "A", "B", and "C"?

A. We was.

Q. What were the terms of the agreement you negotiated with Mr. Grogan with reference to the disposition of the coal after it was produced by you?

A. Mr. Grogan was to handle all the coal that we could mine.

Q. By Mr. Grogan, you mean Paragon Jewell Company?

A. Yes, sir.

Q. Where was it to be delivered?

[fol. 925] A. At their tippie.

Q. At whose expense?

A. At our own expense.

Q. Who was to haul the coal?

A. We were.

Q. How far is it from your mine tippie to the Paragon Jewell tippie?

A. I would say a little over half a mile.

Q. During the course of your operations on Paragon Jewell property, had they taken all the coal that you had produced?

A. Yes, sir, they had.

Q. Have they ever refused any coal?

A. No, sir, they haven't.

Q. What were the terms of the agreement with reference to the building and maintenance of the roads of access to your property?

A. Mr. Grogan was to build a road up by our mines and keep it up.

Q. Was to build a road up to your mines and maintain it?

A. The road went on by us at that time and he was to maintain the mine road.

Q. How far was that road from your tippie?

A. Run right by our tippie, at the bottom.

[fol. 926] Q. How far from your mine entry?

A. About 200 feet.

Q. Who was to build the road from the Paragon Jewell road to your mine?

A. We built that ourselves.

Q. How did you build it?

A. We got a dozer and started work on it to open up the mines, build the work. small dozer, he worked 33 hours and one-half on it and he decided his machine was too small for the job and he advised me if I could, to get the company dozers and their shovels to finish it up.

Q. By "company dozers" you mean Paragon Jewell?

A. Yes, sir.

Q. Did you do that?

A. We contacted Mr. Grogan and he let his shovel and dozer finish up the job for us and we paid him for it.

Q. You paid Paragon Jewell?

A. Yes, sir, we did.

Q. What were the terms of agreement with reference to the price or amount that you were to receive for coal that you produced?

A. We was to get \$4 a ton when we started out and Mr. Grogan told us that the price would be ruled by the market. If the market went up, we would get an increase. If the market went down, we would have to take a cut on the [fol. 927] price of coal?

Q. Now, when you were negotiating this agreement, what was said between you and Mr. Grogan, if anything, as to the right to terminate the agreement?

A. There was never nothing said about that at all.

Q. What was said with reference to your right to mine the coal from within the area covered by your agreement?

A. Well, we was to mine all mineable coal that was under the tract, down there where we leased.

[fol. 928] Q. Did you expect to be there more than three years?

A. Yes, we did, we expected to be there more than that.

Q. At that time, did you and your partner make any plans as to the tonnage which you hoped to build up to?

A. Yes, sir, we did.

Q. What was that?

A. We had our plans to try to get up to 300 ton a day.

Q. Why did you want to get up to 300 ton a day?

A. We figured it would run that much to make any money.

Q. Would you state what you did after you obtained this agreement from the Paragon Jewell to get into operation?

A. Well, we had to build us a tippie, after we got that built, lay a track to the mines, we had to buy machines, power plant, mine cars, and a motor to operate with, and then get men enough to operate it.

Q. How long between the time you went into the property was it before you commenced running coal?

A. Well, I would say somewhere from six weeks to two months, I don't remember just exactly.

Q. Did you—what did you do for power?

[fol. 929] A. We bought us a power plant, we bought a Cummings diesel engine with 100 KW generator.

Q. Did you buy any power from Paragon Jewell?

A. Yes, sir, we did.

Q. What was that for?

A. To run a fan.

Q. Was that a—what kind of fan was that?

A. That was a mine fan, a small mine fan.

Q. What was the agreement between your partnership and Mr. Grogan and with reference to the engineering services inside the mine?

A. Well, we was to pay for the engineering by the ton.

Q. Did this engineer do the inside work?

A. Yes, sir, he did.

Q. How often does he inspect your operations?

A. Well, most of the time when we call him.

Q. How were the payments made to the engineer?

A. Deducted from pay slips by the ton.

Q. Aside from the road to the Paragon Jewell road that ran within two-hundred feet of your mine, is there anything else that Paragon Jewell Coal Corporation has provided for your operation since the commencement?

A. No, sir, they haven't.

Q. Did you have any understanding with Mr. Grogan as [fol. 930] to what you could do with your equipment and buildings when the job was completed?

A. The only thing that was said about that, Mr. Grogan told us it was strictly understood with the landlord that we could not take no buildings down when we got through mining, that was the only thing said about that.

Q. At the present time, Mr. Stilwell, how deep is your mine, how far have you driven back?

A. Well, I would say somewhere around 8,000 feet.

Q. Now, tell us how many mine entries and air courses you have in your mine?

A. We have one mine entry and two air courses and several cross-sections.

Q. What is a cross-section?

A. That is a section turned off your mine entry.

Q. What are—what is the purpose of these air crosses?

A. That is to ventilate the mine.

Q. During the course of your operations, have you ever run into any adverse mining conditions?

A. Yes, sir, we have.

Q. What type of conditions are regarded as adverse in the coal mining operations?

A. We have run into water, we have had to pump it out, and then we run into rolls where the coal squeezes out

[fol. 931] and then you have to shoot through the top to get through.

Q. As you mine coal, what are your problems with reference to the maintenance of the roofing of the mine?

A. Well, you have to keep it well timbered, all loose rock taken down, you have to keep all loose coal cleaned up under the mine lines, and rock dust as well in all working places.

Q. Have you run into these rolls frequently during your operations?

A. Yes, sir, we have.

Q. What do you do when you run into one of these rolls?

A. Have to start drilling and shooting through the top to go through, to make it high enough to get your equipment through if there is any coal on the other side.

Q. When you are shooting the roll, how much coal are you producing?

A. Not any.

Q. Why is that?

A. The coal is all squeezed out, nothing but rock.

Q. Did Paragon Jewell Corporation ever pay you anything for adverse mining conditions?

A. Yes, sir, one time.

Q. Would you state when that was?

A. I believe that was in '55, we went into what we call a sandstone roll and we was having it kind of tough, we [fol. 932] went to Mr. Woods, and tried to get more on the ton for the coal to help us out to get through it, and he wouldn't give us anything on the ton, but he agreed, if we could figure up the cost of going through the roll, he would go 50-50 with us on it.

Q. Did he do that?

A. Yes, sir, he did.

Q. Where was the location of that particular roll?

A. That was right close to the Brown heirs, right next to McNeil tract.

Q. Mr. Woods indicate to you the reason he was desirous, why Paragon Jewell wanted you to get through this roll?

A. Yes, sir, we was trying to get through this roll going on into Brown heir tract coal.

Q. At that time, had they made any representation to you regarding your right to mine on the Brown property?

A. Yes, sir, I believe they told us that we could go on through when we got to it, that they leased the coal and we could drive on across.

[fol. 933] By Mr. Merrell:

Q. What control, if any, does Paragon Jewell have over your mine?

A. Not any.

Q. Who pays the taxes on your equipment?

A. We do.

Q. Who pays the liability insurance?

A. We do.

Q. Did—have you ever borrowed any money from Paragon Jewell?

A. No, sir.

Q. Did you ever borrow any equipment?

A. No, sir, we haven't.

Q. Who obtained the mining permits from the State authorities?

[fol. 934] A. We did.

Q. Who is responsible to the State and Federal Mining?

A. We are.

Q. Do they call at your mine?

A. Yes, sir.

By Mr. Merrell:

Q. Do they inspect your mine?

A. Yes, sir.

[fol. 935] Q. What supervision does Paragon Jewell exercise over your mining operation?

A. Not any, except the engineers sets the spads for us to go by.

Q. Who pays this engineer?

A. We do.

Q. Now the records show that you started mining coal at \$4 per ton, and on February 2, it was increased to \$4.50 per ton. Do you know what caused the increase?



A. Yes, sir, I do.

Q. Would you explain that?

A. We started out at \$4 a ton, and we decided we weren't going to be able to make it, and we made arrangement with Mr. Grogan to have a meeting with Mr. Clyborne and we all met at Richlands one night and talked this over, and he gave us 50 cents raise to help us out.

Q. When you say "we all", who do you mean?

A. Well, I don't know how many was there at the meeting, me and my brother was the parties on our job.

Q. Were other operators there?

A. Yes, sir.

Q. And Mr. Clyborne was there?

A. Yes, sir.

Q. It shows you went along at \$4.50 per ton until October of '52, when it was increased to \$4.75. Do you know the [fol. 936] reason for that increase?

A. I am not sure about that, but I believe that was when United Mine Workers got an increase, the labor.

Q. Do you know whether the price of coal went up at that time?

A. No, I don't.

Q. You went along at \$4.75 until March 1, 1963 when it was reduced to \$4.50 per ton. Will you explain why it was decreased to \$4.50, if you know?

A. Well, they told us that the price of coal went down and they would be forced to cut the price in order to run.

Q. On January 5, 1954 the price per ton was reduced to \$4.25. Did you ascertain the reason for the decrease at that time?

A. That was the same thing again, they said the price of coal still went down, they would have to cut the price in order to run.

Q. Now, it continued at that price until April 1, 1964 when it was reduced to \$4 a ton. Will you tell me, if you know, the reason for the reduction in price to \$4 a ton?

A. That was still the same thing, they told us the price of coal had went down, they were forced to cut the price in order to run.

Q. Did you object to any of these cuts?

[fol. 937] A. Yes, sir, we did.

Q. Did you discuss them with officials of the Paragon Jewell?

A. Yes, we did.

Q. Did they give you any reason for the reduction other than the price per ton?

A. That is all.

Q. Other than the reduction in the market price of coal?

A. That is all they told us the price went down until we were forced to cut the price.

Q. The record shows, and on matters of price, I am referring to Exhibit 74, which shows that the price that you received increased on September 1, 1955 from \$4 a ton to \$4.25. Do you know whether the coal market went up at that time?

A. No, I don't know whether the coal market went up, but that was when United Mine Workers got a contract and increased the labor, and Mr. Clyborne gave us a 25 cent raise.

Q. Now, going back to the first two times that the market price—the amount paid you per ton dropped, did you make any changes in the wages which you paid?

A. No, sir, we didn't.

Q. Has Paragon Jewell ever stopped you from mining on your property?

[fol. 938] A. No, sir, they haven't.

Q. Have there ever been any temporary stoppages?

A. No, sir, there haven't except when there would be no railroad cars, there would be no work, maybe one day or two, something like that.

Q. And when they had no railroad cars, they would tell you they could not take the coal, is that right?

A. Yes, sir.

Q. What would you do then?

A. We would just knock off, we didn't work.

. . . . .

[fol. 939] By Mr. Merrell:.

Q. I direct your attention with reference to coal that was on your right of your indicated boundary, were you ever given the right to mine coal that lay in that area?

A. Yes, sir, we was.

Q. And would you tell us who advised you that you could mine?

A. Mr. Grogan, is the one that advised us we could get that.

Q. And do you know the reasons why you were permitted to mine that coal?

A. Yes, sir, I do.

Q. What?

Mr. Katz: We object to his giving the reason from Mr. Grogan, if that is what he is going to do.

The Court: Yes, sir.

By Mr. Merrell:

Q. Who was mining that coal before you acquired the right to mine?

A. Mr. Henegar, I believe, Coal Company.

Q. How long did Mr. Henegar work on the operation?

A. I really don't know-how long.

[fol. 940] Q. Was it a long time or short time?

A. No, short, not too long.

Q. Were you given any interest in his coal while he was still there?

A. No, sir, we wasn't.

Q. And after he left, what was represented to you by Mr. Grogan?

A. After he left, it was a block of coal left next to our lease that he pulled off and left, and when we drove up there to our line, we asked Mr. Grogan what about us going over and getting that block of coal and he said it was okay, that we could go ahead and mine it.

The Court: When was this, approximately, Mr. Stilwell?

The Witness: It was around, between '52 and '53, I would say.

Mr. Merrell: Were you later given the right to mine any coal that lay on your left?

A. Yes, sir, we was.

Q. And when before you were given this right, who was mining that coal?

A. Well, there were several mining that, I don't know who all. Mr. Salyers was the first one that started on it.

Q. Do you know any other parties who mined that coal?

A. Well, I believe the company mined some in it.

[fol. 941] Q. By "company", you mean—

A. (Interposing) Paragon Jewell Coal Corporation.

Q. At the time you were given the right to mine that coal, was anyone else mining it?

A. No, sir, there wasn't.

The Court: Who gave you the right?

By Mr. Merrell:

Q. Who gave you the right to mine that coal?

A. Mr. Grogan.

Q. I direct your attention now, Mr. Stilwell, to the period in, say the latter part of 1956, and if you can recall, would you tell me who was mining coal on your right at that time?

A. Lee Merritt and Wes Merritt on my right.

Q. Was any other operator mining on your right on either the McNeil or Brown tracts since that time, if you know?

A. I don't know that. I don't know whether there was any more around there at that time or not.

Q. Was there anyone mining between you and the Merritt interests since that time?

A. Not that I know of.

Q. Has there been a designated boundary between you and the Merritt interests?

A. Yes, sir, there was.

Q. And has that boundary been adhered to?

[fol. 942] A. Yes, sir.

Q. Has Paragon Jewell ever endeavored to negotiate a new agreement with you?

A. No, sir, they haven't.

Q. Have they ever had any discussions with you regarding a revision of the agreement?

A. No, sir.

Q. If you can recall, Mr. Stilwell, will you state how long it took you and your brother to attain your planned tonnage, which I understood was 300 tons a day?

A. Somewhere between 18 and 24 months.

Q. Is the division between your mine and Merritt mine is that located on the McNeil tract or Brown tract?

A. That is on the Brown tract.

Q. Is all of the coal you produced brought out of your mine entry?

A. Yes, sir.

Q. No other way to get the coal out?

A. No, sir, the only way we have to get it out.

Q. What was the longest roll that you were ever in?

A. The longest I remember, I believe was 87 feet.

Q. How long did it take you to get through it?

A. I would say around six weeks.

Q. Aside from this one payment that Paragon made to you for going through a roll, have they ever paid anything [fol. 943] to you except the amount per ton of coal delivered to you?

A. No, sir, they haven't.

Q. And this situation on their paying, did that apply to just the one roll or to other rolls?

A. Just the one.

The Court: You mean when they shared the expense?

Mr. Merrell: Shared the expenses.

By Mr. Merrell:

Q. Mr. Stilwell, are you acquainted with what is called outcrop coal?

A. Yes, sir, I am.

Q. Is that coal marketable?

A. Not too good.

Q. How far back into a mine entry do you have to go before you can reach, say, what we call good coal?

A. Well, it just depends on the location that you are in, what kind of condition the coal is in. Sometimes it is good right close to the outcrop and sometimes you have to go maybe 50 feet to clear up and get good coal, and maybe further.

Q. Do you ever know when you are going to hit these rolls?

A. No, sir, you don't.

[fol. 944] The Court: Mr. Stilwell, will you take the stand.

Cross examination.

By Mr. Gillespie:

[fol. 947] Q. Now, you say that when you and your brother, S. W. Stilwell, were talking to Mr. Grogan about mining Paragon's coal, that there was a property map?

A. Yes, sir.

Q. That was the only map that you saw?

A. Yes, sir, at that time.

Q. At that time. Would you recognize that map now, if you saw it, Mr. Stilwell?

A. Well, I believe I would.

Q. I show you what has been introduced in evidence Joint Exhibit 58-BG, and ask you if that looks like the map that Mr. Grogan showed you at the time you say you negotiated the contracts to mine Paragon's coal for them?

[fol. 948] A. No, sir, that is not the map.

Q. This is not the map?

A. No, sir.

Q. Mr. Stilwell, I now show you a blue map and ask you if you recognize that?

A. No, sir, that is not the map I saw.

Q. That is not the map either?

A. I don't think so.

Q. Are you sure that is not the map?

A. I am pretty sure it is not.

Q. Well, do you recall what there is about this map and the map you saw that distinguishes them?

A. On the map that I saw, it only had the outcrop boundary line on it. That is the one we leased the coal on.

Q. Now, Mr. Stilwell, does this map have the boundary lines and outcrop on it?

A. It has some of them on, but that is not the map I looked on when I leased the coal.

Q. You are positive of that?

A. Yes, sir.



Mr. Gillespie: Will you stipulate that the blue map is a duplication of Joint Exhibit 58-BG?

Mr. Merrell: I so stipulate.

The Court: You are stipulating that Exhibit 58-BG is a copy of the blueprint map which is an original property [fol. 949] map, I gather.

Mr. Gillespie: Were you and your brother, S. W. Stilwell together when you talked to Mr. Grogan and went on the property to look it over?

The Witness: Yes, we was.

By Mr. Gillespie:

Q. And you looked at the outcrop at two or three places and finally decided on a place that you would like to start mining?

A. We looked at one place that was faced up, and we went in the woods and picked out the next place where we opened up.

Q. And this place you picked out was where you and your brother decided you would like to start mining?

A. Yes, sir.

Q. And you say that mine was not faced up at the time?

A. No, sir.

Q. Well, you were told by Mr. Grogan that the mine would be faced up, weren't you?

A. No, sir.

Q. You didn't wait for the company to face up the mine?

A. No, sir, we didn't.

Q. You were anxious to get started?

A. Well, we weren't too anxious, but we wanted to get [fol. 950] it done and get ready by the time they got their tippie ready.

Q. Now, Mr. Stilwell, I show you Petitioner's Exhibit No. 80, which has been received in evidence, and which you have testified had certain boundary lines that were pointed out to you and to your brother, S. W. Stilwell.

A. Yes.

Q. Now, that was not the map that was exhibited to you by Mr. Grogan when you and your brother went there to talk about taking the job for Paragon, was it?

A. Not this map, no.

Q. That map was not made until sometime after you had started mining, was it?

A. After we faced our mines up here (indicating), opening everything up, cleaned it up, and cut under the top far enough to set a spad, Mr. Belcher set this map up for us.

Q. Don't you know, Mr. Stilwell, that the line which has been marked with the red letter "A" to the right, and which you say was the boundary line is nothing but a barrier?

A. Well, the map that I looked at had this outcrop line all the way around and this lease line between the Brown heirs and McNeil tract was on the map. Mr. Grogan, he called it a slunge.

Q. Do you know what he was talking about?

A. Yes, sir, that is what I did, that is what we call a [fol. 951] hollow. He laid his hand on the map and said we could go straight up with this line here and straight on back to the Brown heir tract of coal. He laid his hand on the other side over here and said he was putting in another mine, this was here, was the one that was faced up and we looked up—we could come up over here and stop and go straight back to this lease line.

Q. Now, Mr. Stilwell, will you answer my question? Don't you know that the line which has been marked with the red letter "A" on this map is nothing but a temporary barrier that was put on this map by the engineer?

A. The engineer put it on there, we understood it was a boundary line, that was as far as we could go.

Q. You are used to looking at maps, aren't you?

A. Yes, sir.

Q. You know barrier lines and project lines when you see them on the map, don't you?

A. Yes, sir, I do.

Q. Now, isn't that line which has been designated with a red letter "A" nothing more nor less than a temporary barrier?

A. That was intended for a boundary and a barrier between the two mines.

Q. As a matter of fact, Mr. Stilwell, that line has been changed since it was put on there, hasn't it?

[fol. 952] A. Well, I don't know about the line being changed on the other map, but it has not been changed on this map.

Q. Have you stayed within the limits of that line?

A. Yes, sir. At the time we was mining this block of coal, we did.

[fol. 959] Q. Now, when you went there, Mr. Stilwell, you and your brother knew that you both had considerable experience in mining coal?

A. Yes, sir.

Q. And you had experience in mining the Jewel Seam of coal?

A. Yes, sir.

Q. And you were convinced in your ability to do as good a job to mine that coal as the next man?

A. We felt that way.

Q. You felt that you could get that coal if anybody could?

A. Well, we felt like we would like to try it. We didn't know whether we could or not.

Q. Your previous experience had caused you to have the confidence that you could go in there and make some money mining that coal?

[fol. 960] A. We didn't know about making the money, but we was going to give it a try.

Q. If you hadn't felt you could make money you would not have been interested in going in?

A. Of course we thought we would make some.

Q. And you have been successful, haven't you, Mr. Stilwell?

A. We have kind of got by.

Q. Now, of course as long as you're making money, you wouldn't consider stopping, would you?

A. No, sir, we wouldn't.

Q. Of course it is true that Paragon Jewell Coal Company had this considerable acreage of coal and they wanted it mined?

A. I suppose they did.

Q. And as long as the arrangement was profitable to Paragon, it would have been rather foolish to have stopped it, too, wouldn't it?

A. I think so.

[fol. 961] Q. It is a fact, Mr. Stilwell, that you were required to take all the coal that you mined to Paragon's tipple?

A. Yes, sir, it was.

[fols. 966-968] Q. Now, Mr. Stilwell, to whom do you look for your money when you mine that coal and deliver to Paragon's tipple?

A. When we haul our coal down to tipple, we look to Paragon Jewell Coal Company for our money.

Q. Do you look to anybody else whatsoever for any part of your money for mining that coal?

A. No, sir, we don't.

Q. Isn't it a fact that when you deliver a load of coal to that tipple, you know exactly what you are going to receive for it?

A. After it is weighed, we do.

Q. After it is weighed?

A. Yes, sir.

[fol. 969] Q. Nothing further that you have to do?

A. No, sir.

Q. You don't know what Paragon does with it at all?

A. They put it through the tipple, I don't know where it goes to then.

Q. You don't know whether they sell it at a profit or loss, or what they do with it, do you?

A. No, sir, I don't.

Q. Did you ever buy any interest in this coal there in place?

A. No, sir, we didn't.

Q. Did you ever in any way acquire any title or interest in that coal in place?

A. The only thing we did, we leased the coal and we bought our equipment and set up to mine the coal for the company.

Q. Now you say you leased it. What royalty did you pay?

A. Well, we didn't pay any royalty, that was figured in the price, the way the contract was set on the start of the mine.

Q. You say you paid no royalty?

A. No, sir.

Q. Did you pay any rent?

A. No, sir.

[fol. 970] Q. Did you pay taxes on the land?

A. No, sir.

Q. What consideration did you pay, if any, for—

A. (Interposing) We pay our own taxes on our equipment, we pay the workmen's compensation, we also pay the social security, the unemployment tax.

Q. But all of those are costs that have no connection with the body of coal that is under the ground there, aren't they?

A. We pay all labor that it takes to mine the coal and our own expenses.

Q. And all the labor, all your insurance costs, all your power, those things your supplies, you charge off to the expense of operation, don't you?

A. Yes, sir.

Q. And all of the equipment that you have purchased, you depreciate that?

A. Yes, sir, equipment, yes, sir.

Q. You say there was nothing said about termination?

A. No, sir.

Q. You knew that you could quit any time you wanted to, didn't you?

A. We didn't know whether we could or not, nothing was said about that.

[fol. 978] Q. And the \$100,000 that you spent to get set up for mining was all in an appreciable extent that has now been depreciated down to about \$2,000, hasn't it?

A. No, sir, I don't think so.

Q. It has always been depreciated, hasn't it, and is being depreciated?

A. Yes, sir.

Q. Every bit of it? Isn't that right? That is correct, isn't it, Mr. Stilwell?

A. I don't understand your question.

Q. I say, every cent of money that you invested to get ready to mine has been in equipment that you have taken depreciation on every task used?

A. No, sir.

Q. What is it that you have not depreciated?

A. Well, we have to buy a lot of timbers and stuff like that we don't depreciate it.

Q. You charge that off to expenses and supplies, don't you?

A. Yes, sir.

[fol. 979] Q. Mr. Stilwell, do you say you have a certain area that you are supposed to mine all the mineable coal, is that correct?

A. That is correct.

Q. How much of the coal under that area are you supposed to mine?

A. We was supposed to mine all mineable coal.

[fol. 984] Q. Mr. Stilwell, I may have asked you this, I am not sure, could you take the coal which you mine from Paragon's lands any place except to Paragon's tippie?

A. Well, there was never nothing discussed on that. I don't know if we couldn't sell the coal, we might work out an agreement to take it some place.

Q. I am talking about under the agreement you had with Mr. Grogan?

A. We never did want to take it anywhere else. They have always handled all the coal we have mined. We had no cause to take it anywhere else.

Q. You have stated there were times the tippie was [fol. 985] closed down and you had to knock off and quit?

A. We didn't want to work.

Q. Now, have you ever given any consideration to taking that coal any place else?

A. No, sir, we haven't.



Q. You knew that you had to take all of that coal to Paragon's tippie?

A. No, sir, we didn't because nothing was said about that.

Q. If you took it some place else, what would you have paid for it?

A. That would be an agreement between us and the company, but we never had no cause to do that.

Q. That is not included in any agreement you had?

A. No, sir, no, sir, nothing said about we had to take it all there or not.

Q. You were told by Mr. Grogan that you would be expected to bring all the coal you mined to Paragon's tippie?

A. No, sir.

Q. Your statement is that he told you he would handle all the coal—

A. (Interposing) That we could mine.

Q. That you could mine?

A. Yes, sir.

[fol. 986] Q. And in all the ten years that you have been mining, you have never taken a lump anywhere else?

A. Nothing except when we first opened up, we had some outcrop coal, while we was getting the tippie, Mr. Woods or Mr. Grogan one had my brother to haul a load to Mrs. McNeil for house purposes.

[fol. 987] Redirect examination.

By Mr. Merrell:

[fol. 988] Q. Have you ever been accused of not mining all the mineable coal by Paragon?

A. No, sir, we haven't.

Q. You mentioned driving through these rolls, why, you said, I believe, it was your practice to always to through them. Why were you willing to drive through them?

A. Well, we expect when we drive through to hit coal on the other side.

Q. Do you mine on rubber or rails?

A. On rails.

[fol. 994] The Court: Just one question, Mr. Stilwell, you mentioned, I believe it was on direct examination, or maybe on cross-examination, about pulling the pillars without getting anybody's permission to do so. It was my understanding you testified that you left enough to leave the mine safe?

The Witness: That is right.

The Court: In other words, you did not pull pillars that [fol. 995] would permit the roof to fall?

The Witness: That is right.

The Court: Thank you, Mr. Stilwell.

LEE MERRITT was called as a witness by petitioner [Merritt] and having been first duly sworn, testified as [fol. 996] follows:

Direct examination.

By Mr. Merrell:

Q. What is your business, Mr. Merritt?

A. Truck mining operator.

Q. I believe the stipulation shows that during the period here involved, that you were a partner in Standard Smokeless Coal Company?

A. That is right.

Q. And Kyva Mining Company?

A. No, sir, I was not a partner in Kyva.

Q. Were you a partner in the Far West Mining Company?

A. Yes.

Q. Where is the Standard Smokeless Coal Company mining coal at the present time?

A. Near Whitewood, Virginia.

Q. Is that on property that is under lease to Paragon Jewell?

A. Yes, sir.

Q. When Standard Smokeless started mining coal on this property?

A. Well, the best I can remember, I believe I started [fol. 997] building my buildings and tipple, and set up in June of 1953.

Q. And have you mined since then?

A. Yes, sir.

Q. What kind of agreement have you mined under? Is there a written agreement or oral?

A. Oral.

Q. With whom did you negotiate that oral agreement?

A. Mr. Grogan.

Q. When did you negotiate it?

A. Started negotiating, I guess, along sometime in June of '53.

Q. Where did those negotiations take place?

A. There on the job.

Q. Will you tell us what you were doing before you went to the Paragon Jewell property to investigate a possibility of a mining operation there?

A. Truck mining in Kentucky.

Q. And why did you leave Kentucky?

A. Well, business got bad in Kentucky and work in coal business was kind of bad at that time of year.

Q. Did you have any operation over there you were mining?

A. Yes, sir.

Q. What was the name of that operation?

[fol. 998] A. Elchorn Creek Colliers Incorporated.

Q. Then when you went over to the coal properties, who was the first official of Paragon Jewell you contacted?

A. Mr. Grogan.

Q. And will you state what transpired between you and Mr. Grogan?

A. Well, when I went there, I met Mr. Grogan. First how come I got there, a mining inspector, compensation inspector, advised me if I was looking for some coal to lease, to go up and see Mr. Grogan, he was putting in a new job there, and for steady work, the future looked pretty good.

I went up to see Mr. Grogan and I met him on the job. I told him I was a truck miner and truck mining in Kentucky and if he had any coal to lease to a truck miner. He said he did if I could meet his requirements.

Q. Did he state what those requirements were?

A. Yes, sir.

Q. What were they?

A. He wanted me to be financially able to buy the proper equipment to mine that coal with, such as air compressor, good equipment to show him that I could mine coal and would mine coal.

Q. Were there any other requirements?

A. I just can't remember offhand.

Q. Did you negotiate an agreement, reach an agreement [fol. 999] with Mr. Grogan?

A. Yes, sir, after three or four months negotiating—after three or four weeks negotiating.

Q. You talk with him off and on for three or four weeks?

A. Yes.

Q. Then you reached an agreement?

A. Yes.

Q. Could you fix approximately the time when you reached this agreement?

A. Well, it must have been, when I finally decided to start, it must have been sometime in July.

Q. What were the terms of this agreement, first with reference to the area of coal that you would be mining?

A. Well, when I went there, the location that I am on, they didn't have the road out to it. And he told me we went around to the end of the road, where they was building the road at this time just as quick as he got out here far enough, for a location for me, we would go up and look at the coal, that they would build the roads, maintain the roads, face up the coal, to where I was going in, and I would be charged a small fee for that, but not to worry about it, until after I got going.

Then when they got the road out to the location, and they got the coal faced up, he went up and he and I went [fol. 1000] together, and he, they didn't have any map at that time, or at least he didn't show me one. He laid me

off an area with his hands, up between two hollows, and told me that—I told him that I didn't want just a small area of coal, that there was three of us going to be partners and we couldn't make any money without me running coal. And he assured me I would be laid off enough coal to run at least 150, 200 tons a day for five or six years.

Q. Now, what were the terms of that agreement with reference to what coal you were to mine within the area indicated?

A. I don't know whether you—I understand you.

Q. Were you required to mine all the coal?

A. I was supposed to mine it according to State mining law, and all mineable coal.

Q. And who was to have responsibility for the operation of your mine?

A. I was.

Q. Was anything said regarding the engineering services that would be needed inside the mine?

A. He said that they would provide an engineer, and I would be charged three cents a ton.

Q. And what about, was any arrangement made regarding power?

A. Well, he said they had a transmission line, I would [fol. 1001] have to furnish my own substation, and AC power, where he set the last pole, I had to take on from my expense.

Q. They offered to sell you power to a certain point?

A. That is right.

Q. And you could buy, how were you to pay for that power?

A. So much a ton.

Q. Now, was anything said with reference to the disposition of the coal after it had been mined?

A. I don't understand your question.

Q. What was your—if anything—was your agreement or what was told you by Mr. Grogan as to what would be done with the coal after you mined it?

A. Well, they was wanting coal there and he was always wanting more coal than I could run.



Q. Did he make any representation as to what Paragon Jewell would do regarding the coal that you mined?

A. I would mine the coal and haul it down to their tippie.

Q. What would they agree to pay you for the coal?

A. You mean the price?

Q. Yes.

A. I would be paid every two weeks, at this time, I believe it was every two weeks.

[fol. 1002] Q. Under that agreement, what were you to do with the coal after you mined it?

A. After I mined the coal?

Q. Yes.

A. I was to haul it down to Paragon Jewell's tippie.

Q. And did they make any representations to you as to how much of your coal they would take?

A. They wanted more than I could mine, always wanted more than I could mine.

Q. How did they agree to compensate you for coal which you mined?

A. They paid off every two weeks.

Q. How was the payment based?

A. Well, he said my price would be based on the market price of coal.

Q. What would happen if the market price went down?

A. Well, I guess we went down.

Q. And if it was increased, what would happen?

A. We went up.

Q. And you were to be paid on a tonnage basis?

A. That is right, so much per ton.

Q. What kind of mining did this agreement contemplate, a strip mining or deep mining?

A. Deep mining.

[fol. 1003] Q. Now, when you and your partners started the Standard Smokeless operation, did you have any planned tonnage figure which you hoped to attain?

A. Yes, sir.

Q. What was that?

A. From 150 to 200 ton a day.

Q. Do you know how long it took you to attain that tonnage?



A. Well, I don't know, I would have to look at the records, but probably a year.

Q. How far back into the mountain have you driven at this time?

A. I could measure it on a map, I guess about 3,000 feet.

Q. That is referring to the Standard Smokeless?

A. That is right.

Q. Now, when you started mining, was there an operating mine on your right?

A. Not when I started there wasn't anything on my right.

Q. Was there an operating mine on your left?

A. Yes, sir.

Q. Who was operating that mine?

A. Martin, Harry Martin.

Q. And was there any proposed mine between you and [fol. 1004] Mr. Martin?

A. Yes, sir, later, after I got started, this Martin I don't know what happened to him, they put a proposed mine between my mine and his mines, but on the left of the hollow, that they laid out for me.

Q. When you started, did they tell you how far back into the mountain you could drive?

A. Well, something he said, around 3,000 feet.

Q. Did they tell you how far you could go to the right and to the left?

A. Oh, yes.

Q. Did they submit to you a map?

A. When they brought my first map, it had it on there how far to the left and right, I could go.

Q. After you obtained this agreement with Mr. Grogan, what did you do in order to get into operation?

A. Well, I built a shop, tippie, substation, and proceeded to start taking coal out of the mine.

Q. Why did it take you approximately a year before you got up to your planned tonnage?

A. Well, I had to get my mine developed to get in far enough to get working places.

Q. You are also a partner in the Far West Mining Company, isn't that right?

A. When Far West first started I was, not at this [fol. 1005] time, no.

Q. You were when it was first started. Do you recall when that was?

A. I would have to guess. I believe in '56.

Q. Late in '56?

A. I believe so.

Q. Is Far West Mining on Paragon Jewell's leased property?

A. Yes, sir.

Q. And they started mining when it was sometime in the latter part of '56, do you remember?

A. I believe so.

Q. Did—how many mines is Far West operating at the present time?

A. Really, I don't know right now.

Q. You are not a partner now?

A. Not a partner.

Q. How many was it operating when it first started operations on Paragon?

A. I believe three.

Q. Three?

A. Yes.

Q. Did it establish these mines or did it acquire them from another party?

A. Acquired it from another party.

[fol. 1006] Q. Who was that party?

A. Sherman Meadows.

Q. Was he operating on the property before Far West acquired it?

A. Yes, sir.

Q. How did you acquire them?

A. Well, I met Mr. Meadows one day in Raven and he told me he was wanting to sell out.

[fol. 1007] The Witness: It was on a Sunday, I met Mr. Meadows in Raven and he and I had been talking a little bit about this deal. Mr. Meadows claimed he had more business than he could take care of and he was going to have to turn some of it loose. I told him if the price was right for his mines, I might be interested in it. And I met Mr. Meadows on this day and he said he had definitely decided

to sell. We arrived at a price, and I was on my way to Bluefield at that time, so when I got in Bluefield, I called Mr. Woods, and told him that I had met Mr. Meadows in Raven and Mr. Meadows was wanting to sell me his mines. And if it would be—if he thought it would be all right for me to buy Mr. Meadows' mines, and he said he would be glad for me to, that they wanted coal from out there.

So, I came back and I told my brother about it and my brother and I and Mr. Bowling and we decided to become partners.

By Mr. Merrell:

Q. What did you tell Mr. Woods?

A. I told Mr. Woods I talked to Mr. Meadows and Mr. Meadows wanted to sell his mines and if he thought it [fol. 1008] would be all right for me to buy. He said it would be all right for me and Wes and Mr. Bowling to buy it, be glad for us to have it, that they wanted to get coal out of there.

Q. Did you and the other partners in Far West at that time enter into an agreement with Mr. Meadows?

A. Agreement with Mr. Meadows?

Q. Yes.

A. Yes, sir.

Q. Was that agreement in writing?

A. Yes, sir, as far as price.

[fol. 1011]

By Mr. Merrell:

Q. Prior to your entering into the agreement with Mr. Meadows, which is Petitioner's Exhibit 84, did you take any steps to ascertain the area of coal that Mr. Meadows was entitled to mine?

[fol. 1012] A. Yes, sir, I knew that.

[fol. 1013]

By Mr. Merrell:

Q. First, did you take any steps to ascertain this area?

A. I knew the area.

Q. How did you know the area?

A. Well, I was mining there close by, and I was keeping a close eye on it.

Q. Well, what did you—from what did you determine the area?

A. From the map.

[fol. 1018] By Mr. Merrell:

Q. Under your agreement with Mr. Meadows, what were you buying from him?

[fol. 1019] A. Well, I was buying all of his holdings there where he was at and mainly the mines. I didn't have any use for equipment, but we did buy the equipment with the mines.

Q. Why were the mines of so much importance to you?

A. Well, there was a lot of coal there to mine.

[fol. 1021] Q. When you were negotiating your agreement with Mr. Grogan, did he say anything to you about a right on the part of Paragon to terminate the agreement?

A. No, sir, we never discussed that.

Q. Did he say anything about the right of either party to claim depletion on their production?

A. No mention.

Q. When you bought out the Far West Mine, was there anything said by Mr. Woods when you talked to him regarding termination?

A. No, sir.

Q. When Far West bought out the Meadows Mine?

A. No, sir.

Q. Was anything said at that time regarding the right of either party to claim depletion?

A. No, sir.

Mr. Merrell: That is all.

Cross examination.

By Mr. Gillespie:

[fol. 1023] Q. You asked him if Paragon had some coal that you might mine for him?

A. I asked him, did he have some coal to lease to a truck mine operator.

Q. Well, you asked him if he had some coal to lease?

A. That is right.

Q. It is your contention, I guess, that you lease some coal?

A. Right.

Q. Is that right?

A. That is right.

Q. What did you pay for the lease?

A. Well, I didn't pay anything.

Q. Did you agree to pay any royalties for it?

A. No, sir, it wasn't discussed.

Q. Pay any rent?

A. No, sir.

Q. Pay anything for it?

A. Well, I don't know what your question is—I didn't pay anything.

[fol. 1028] Q. Now, Mr. Merritt, do you say you don't recall anything being said about termination?

A. No, sir.

Q. Not as long as you continued to make money, you wouldn't be interested in stopping, would you?

A. Well, I wouldn't think so.

Q. And as long as you are producing a sizeable amount of coal and delivering it to Paragon's tippie, you see no reason why they would be interested in stopping you, would they?

A. No, sir.

Q. Because that is what they are there for, to get all of the production that they can get?

A. I imagine so.

Q. They are constantly urging you to increase?

A. That has always been the case; yes, sir.

[fol. 1029] Q. Mr. Merritt, you have also testified that the prices which you were paid for mining and delivering this coal to Paragon's tippie has gone up and down some eight or nine times since you have been there, is that correct?



A. I don't know whether I said eight or nine times or not, but it has went up and down.

Q. How many times has it gone down, do you recall?

A. I just couldn't recall; I would have to refer to the books.

Q. Well, there have been one or two occasions when you protested pretty strongly about the price going down, haven't you?

A. Well, I don't know whether I protested too strong or not, but I am always interested in getting all the money out of my work I can for my coal.

Q. When the price got down to \$4.00 a ton, there in 1954, didn't you object very strenuously to it?

A. I just can't remember objecting very strenuously, but I guess if I talked to one of the Paragon Jewel officials, I imagine I was always wanting more money.

Q. Always wanting more money?

A. I guess so.

Q. You don't remember objecting to a cut in the price [fol. 1030] that they imposed there at one time?

A. I don't know to just what you are referring to about strenuously.

Q. Well, did you object at all?

A. Sure, I'm sure I object any time they cut me.

Q. Every time the price went down, you are sure you objected?

A. I imagine I did.

Q. They didn't raise the price when you objected, did they?

A. No, sir.

Q. Yet you continued to deliver that coal to Paragon's tipple, didn't you?

A. That is right.

Q. The reason was that your oral agreement with Mr. Grogan required you to deliver all of that coal to Paragon's tipple, didn't it?

A. My agreement with Mr. Grogan that they would take all the coal I could mine.

Q. Do you mean to imply to this Court that you had the right to take the coal anywhere else?

A. That was never discussed.



Q. Well now, if the price which Paragon agreed to pay was cut to the place where you objected, why didn't you take your coal some place else to see if you could get [fol. 1031] a higher price?

A. Paragon was paying more than the other places in the area was paying.

Q. Has that always been true?

A. To the best of my knowledge it has always been true.

Q. Have you ever gone to any other place to inquire as to what they were paying?

A. When you say go, I pay pretty close attention to all of them.

Q. Have you ever gone to any other coal producing plant in that area and inquired as to whether or not they were paying more than Paragon was paying you for producing the coal at any time?

A. Well, just who would you mean, who did I go to?

Q. Anybody, Jewell Smokeless, Jewell Ridge, any?

A. That is public knowledge all the time what they are paying.

Q. Would you mind answering my question, have you ever gone to any of those places to find out what they were paying?

A. No, sir, not directly to any company official that I can remember of.

Q. Isn't it a fact that the reason you never made any inquiry was because you knew you had to deliver this coal [fol. 1032] to Paragon's tippie because it was their coal?

A. Because they was paying me more for it than the other places were paying.

Q. What did you have to do in order to be entitled to your money?

A. What did I have to do?

Q. Yes.

A. You mean from Paragon Jewel?

Q. Yes.

A. I had to deliver them the coal.

Q. You had to mine the coal and deliver to its tippie?

A. That is right.

Q. Then you felt that you had fulfilled your part of the contract?

A. Well, when I delivered the coal and went over the scales, I felt that I was entitled to my pay for it.

Q. You were entitled to your pay for it. And you didn't look to anybody else whatsoever for your money, did you?

A. Not for coal when I took it to Paragon Jewel; no, I wouldn't look to anyone else.

Q. And you had no way of knowing what Paragon Jewel did with the coal, whether they sold it at a profit or loss or what they did with it, did you?

A. Nothing positive; I wasn't positive, but I don't believe [fol. 1033] they lose.

Q. But you never at any time knew what the price was that Paragon received for the coal if they sold it?

A. Not definite.

Q. At the time you dumped your coal into Paragon's tipple, you knew exactly how much you would receive for that particular coal, didn't you?

A. Yes, sir.

Q. They never changed the price at any time without giving you notice in advance, did they?

A. That is right.

Q. Mr. Merritt, you say that you had some area or boundary of coal which you say Mr. Grogan laid out with his hands?

A. That is right.

Q. That was the manner in which this area or boundary was described to you at the time you originally negotiated this agreement with him?

A. Yes, sir.

Q. Did you have any agreement or understanding with them as to what your obligation would be if you failed to mine all of the mineable coal in the area which you say he laid out with his hands?

A. Why, my agreement with him, I felt I was obligated to mine the coal in a mining-like way according to state [fol. 1034] mining law.

Q. Did he ever tell you if you didn't mine you would have to pay for it?

A. I don't believe that was discussed.

Q. That wasn't discussed?

A. No, sir.

Q. So he didn't tell you you were compelled to mine all the mineable coal in any given area, did he?

A. Yes, he said I would be bound to mine all mineable coal.

[fol. 1037] Q. You have stated that at the time Far West bought out Meadows, that you didn't consider that equipment worth anything?

A. That is right, truthfully I didn't, but I think we did put a value on it, maybe \$5,000 or \$6,000, but without the mines, I wouldn't give a thousand dollars for it.

Q. Mr. Merritt, that \$21,000 you say you spent for the Meadows Mine, you depreciated in your tax return for that year as equipment, \$21,000, didn't you?

A. You will have to ask Mr. Persinger about that.

Q. In other words, you didn't spend any \$21,000 for something there and then not take depreciation on it, did you?

A. Now you are getting too deep for me. You will have to talk to him about that.

Q. Who furnishes Mr. Persinger with the information on which he makes the returns?

A. My bookkeeper.

[fol. 1039] By Mr. Gillespie:

Q. You say that you had already looked over Mr. Meadows' operation before you talked to him on this subject at Raven, Virginia about buying?

[fol. 1040] A. I was pretty familiar with what he had out there.

Q. You considered that he had some definite area of coal?

A. Sure.

Q. That he could mine?

A. Yes.

Q. That was what you were buying and not the machinery?

A. That is right.

Q. If you felt that he had something which he was entitled to sell, why did you go to Bluefield and ask Mr. Wood for permission to buy?

A. Well, I figured that Mr. Meadows was leasing from Paragon Jewel and I wanted to see if it was okay for me to take his lease over.

Q. If it was his, he could dispose of it in any manner he wanted to, couldn't he?

A. But he had—I figured he had a lease just like I did, nothing in writing, so I thought I better be sure of it.

[fol. 1042] G. W. MERRITT was called as a witness on behalf of the petitioner [Merritt], and, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Merrell:

Q. You are one of the petitioners in this case?

A. Yes, sir.

Q. What is your occupation?

A. Mining, mine operator.

Q. During the years 1954, '55 and '56, you were a partner in Standard Smokeless Company?

A. Yes, sir.

Q. Which mined coal on the Paragon Jewel lease?

A. That is right.

Q. Did you hear the testimony of your brother, Lee Merritt, regarding the negotiations with Mr. Grogan?

A. Yes, sir.

Q. Did you ever discuss this agreement with Mr. Grogan [fol. 1043] before Standard Smokeless went on the job?

A. Yes, sir, about the time they was going on the job.

Q. Was that after your brother had been over there discussing it?

A. Yes, sir.

Q. Now when you discussed this agreement, did Mr. Grogan advise you as to any specific area of coal that you would be entitled to mine?

A. Yes, sir, he laid out a certain boundary of coal, when we did get up on the hill, a certain boundary of coal we could mine.

Q. What did he say with reference to the responsibility for the mining operation?

A. Well, as I remember, he said that the company built the roads and maintained them and that they would build a supply road and face the coal up; that they would probably make a small charge for building the supply roads. And after they faced the coal up, from there on, it was ours, it was our responsibility.

Q. Who was to pay for the engineering services?

A. We were.

Q. Who was to obtain the mining permits?

A. We were.

Q. Who was to be responsible to the state and Federal Mine Inspectors?

[fol. 1044] A. We were.

Q. What was said with reference to the disposition of the coal after you had extracted it from the ground?

A. Well, as I remember it, Mr. Grogan said that they would buy all the coal we could produce and deliver down to their tippie.

Q. What was said regarding the price that they would pay for coal delivered?

A. Sir, he said the price would be governed by the fluctuation of the market.

Q. What was to happen if the market went bad?

A. Well, the price would go down.

Q. And if the market went up?

A. We would get an increase.

Q. During the period of time that you have been mining there, has the price Paragon Jewel has paid to you changed?

A. Oh, yes.

Q. What has been the basis of these changes, if you know?

A. Well, to the best of my knowledge, it has been general market conditions, the demand for coal, and most of the time, when the union would get an increase, why we generally got an increase there.

Q. Now, when you were talking with Mr. Grogan, did [fol. 1045] he say anything regarding the rights of termination of the agreement?

A. There was nothing mentioned about termination of agreements.

Q. Did he encourage you to take the operation?

A. Well, Mr. Grogan, he seemed to be very pleased that we came over there after he found out that we were miners down in Kentucky because he left the impression with me that he was wanting some coal and he was very eager for us to get started on the operation.

Q. Was anything said at that time regarding depletion?

A. No, sir, never mentioned at that time.

Q. Did Mr. Grogan offer you one or two mine operations?

A. We asked him for two locations when we talked to him, told him we would want two.

Q. Did he agree to give you two?

A. Yes, sir.

Q. I believe the first one was Standard Smokeless?

A. That is right.

Q. What was the name of the second operation?

A. Kyva.

Q. When did you talk with him about the Kyva operation?

A. Well, it was immediately after Standard, sometime after Standard went in. They were building a road around the mountain. They weren't progressing too fast with the [fol. 1046] road, but after we got our Standard mine started, then I believe it was in early next spring, sometime in '54, we decided on the location for Kyva. The first one Mr. Grogan laid out for us we wouldn't accept because it was too close to Standard.

Q: That was the first location he laid out for Kyva?

A. Yes, sir, the first location he laid out for Kyva.

Q. When you wouldn't accept that, what did you do?

A. We started walking around the hill, Mr. Grogan and Mr. Watson and I believe were together, and we walked for some distance and he seemed to think we was getting too far, but we coaxed him to walk a little further and finally we come to a point where that was the limit and he said, "This is plenty." He said, "You have 100 acres of coal here," and he laid it out from this hollow to this hollow out here, on his left, and that was to be the Kyva Mine.

Q. Thereafter, did you start your operations in Kyva?

A. Right away, we started working on it.



Q. Did they submit a map to you showing the area involved in the Kyva Mine?

A. Not at that time they didn't.

Q. Later did they?

A. Yes.

Q. I hand you Petitioner's Exhibit 81 and ask you to [fol. 1047] indicate on there which is the Kyva Mine?

A. Number six.

Q. I'm going to put a "K" by number six there. Now, Mr. Merritt, will you show me what you understood to be the boundary of the Kyva Mine at the time this map was submitted to you?

A. The boundary of the Kyva Mine at the time it was shown to us?

Q. Yes.

A. You can see here, there is a little ravine here.

Mr. Katz: What?

The Witness: Little ravine right here, little hollow. There is a water—

Mr. Katz: (Interposing) Mr. Examiner, we object. There is nothing there.

The Witness: Sir, if you was on the property, you could see the ravine here. There is a culvert under the road right here at this spot.

The Court: That is right above the letter "K"?

The Witness: That is right.

By Mr. Merrell:

Q. Make a small "x" right there. From that "x" show us the right boundary of the Kyva Mine, as you understood it? Mark that with a "B."

A. This (indicating) is it.

[fol. 1048] Q. Now show us on the other side, the left side, the boundary between the Kyva Mine and the other operation shown there?

A. Right here (indicating).

Q. That is the area there which has been indicated "D."

A. That is right.

Q. Who owned the mine on the left of the letter "D"?

A. We did. That was my brother and Mr. Watson.

Q. Standard Smokeless Mine?

A. That is right.

Q. Who owned the mine on the right of the letter "B"?

A. At that time it was owned by Sampy Lester.

Q. Did the Kyva Mining Company acquire what interest Mr. Lester had in the mine on the right which is mine number seven?

A. I believe we bought him out in early '56. I'm not sure.

Q. You bought him out in early '56?

A. To the best of my memory.

Q. Thereafter, did you mine the coal in mine number seven?

A. Oh, yes, we mined that.

Q. Is Kyva still operating on Paragon Jewel property?

A. No, sir.

[fol. 1049] Q. Why not?

A. It is worked out.

Q. Now in working out the Kyva Mine, did you mine the coal within the boundaries you have here indicated?

A. We did.

Q. After you had driven up and mined this coal, then what did you do?

A. Well, just before we mined out here, we bought Mr. Sherman Meadows—

Q. (Interposing) I'm talking on the Kyva operation, did you pull back after you mined out?

A. After we mined out—

Q. Up?

A. Yes, after we drove up, then we pulled the pillars back.

Q. Did you obtain all mineable coal in the area allocated to Kyva?

A. Yes, sir.

Q. Was Paragon Jewel satisfied with your mining and working out of the Kyva Mine and the addition of the Sampy Lester Mine?

A. I think they were.

Q. You do know about when the Kyva Mine was worked out?

A. Best I can remember is sometime in '57 or maybe [fol. 1050] early '58, somewhere along in there.

Q. You have mentioned Standard Smokeless and Kyva. Did you acquire any other operations on the Paragon Jewel property?

A. Other than Standard, Kyva, yes, sir, we bought Mr. Meadows out.

Q. That was the Far West Mine?

A. We made that the Far West Mine; yes, sir.

Q. When you bought out Mr. Meadows, what did you obtain from him?

A. Well, we got a bunch of pretty well worn out equipment and a lease that he had out there and a nice block of coal that we thought was a nice block of coal.

Q. Did you ever discuss that block of coal with Mr. Frank Woods?

A. Yes.

Q. Did he make any statements with reference to that block of coal?

A. Well, he said he would like to see us buy Mr. Meadows out. He would like to be getting some coal from there.

Q. Did he make any other statements regarding the block of coal?

A. He said it was one of the largest blocks of coal left in the Brown tract on that side.

[fol. 1051] Q. Now, I believe the evidence shows that you bought out Mr. Meadows in November 1956?

A. I believe that is right.

Q. Thereafter, when was the first map submitted to you showing the Far West operation?

A. I imagine it must have been in maybe January of '57.

Q. When you saw that map, did it cause you any concern?

A. Yes, sir, very much.

Q. What was the reason for that concern?

A. Well, the area had been reduced considerably from what we thought.

Q. From what you thought it was before you purchased it?

A. Yes, sir, from what we had been showed it was after we had bought the mine.

Q. What action did you take with reference to that problem?

A. We immediately went to Mr. Woods with the map that was presented to us with the reduced area.

Q. Who is we?

A. That was my nephew, Virgil Bowling there.

Q. He was a partner in Far West?

A. Yes.

Q. That transpired when you took this matter up with Mr. Woods?

[fol. 1052] A. Mr. Woods said that Mr. Belcher knew it wasn't right, we still had original boundaries he showed us we had.

Q. Was the map changed to reflect the original boundary?

A. Now how is that?

Q. I believe you testified Mr. Woods said that Mr. Belcher was not right in reducing the boundary?

A. That is right; that is right.

Q. Was the original boundary reestablished?

A. He said it still was where he showed us it was.

Q. Now if you can, let me ask you first, on this boundary you are talking about, who was mining on the other side of this, what you understood to be the boundary line?

A. Now which other side? You mean on the other side of the mountain?

Q. No.

A. Or to our right or the left? That is the only place it could have been.

Q. To your left?

A. To my left, that would have been Standard Smokeless to my immediate left.

Q. Then next to Standard Smokeless?

A. That would have been Bare Ridge in behind Standard.

Q. Now this boundary that you said was mistakenly put on this map, as you viewed it, did that separate your mine and what other mine?

[fol. 1053] A. It didn't separate our mine from any other mine. It just cut off the boundary—he just cut off the boundary on the right.

Q. And gave you less coal than you thought you had under the Meadows agreement?

A. Oh, yes, oh, yes.

Q. Now when you started the Kyva operation, did you have any planned production tonnage which you hoped to attain?

A. We did.

Q. Do you recall what that was?

A. Well, sir, on the Kyva operation we put in, it was kind of something new to us. When we put the Standard in, we put it in on rubber equipment.

Q. Yes.

A. Well, Mr. Grogan, he wanted to see us put in one like the Stilwell boys. He always held them out as his example of mining coal in a thin seam, in the Red Ash Seam. Well, when he showed us this, when he showed us the Kyva operation, he laid it out and told us we would have what we thought was 100 acres. Really, the day we walked around that mountain, we walked and stood around there and I thought it was 100 acres. We started buying equipment for tracking. He wanted us to put in a track mine.

Q. Had you ever mined on a track before?

A. Oh, yes.

[fol. 1054] Q. Had you ever mined this seam of coal before except for Standard Smokeless?

A. No, sir.

Q. Did you attempt to put in Kyva on tracks?

A. We did.

Q. Was that enterprise on tracks successful?

A. No, sir, no, it was not.

Q. And when you decided it was unsuccessful, what action did you take?

A. Well, we went to try to get rubber tired equipment, and we were so far in the hole then that we really thought we were broke up, we was about, as I remember, some \$20,000 in the hole.

Q. On the Kyva operation?

A. Yes.

Q. And after you started the rubber operation, did your situation change?

A. Changed somewhat, yes, sir.

Q. For the better?

A. Yes, sir.

Q. And now at the beginning, what did you plan your expected tonnage to be?

A. We figured on around 150 to 200 ton out of each operation.

Q. Did you ever reach that tonnage, if you know?  
[fol. 1055] A. We did at Standard, but we never did at Kyva.

Q. You were never able to reach it?

A. I don't think we ever did.

Q. Are you still mining coal in Far West?

A. Yes, sir.

Q. And in Standard Smokeless?

A. Yes, sir. My brother is still mining, I am no longer partner now in Standard.

Q. And he is no longer partner in Far West?

A. That is right.

Q. Has Paragon Jewell ever made an effort to revise the agreement which you made with Mr. Grogan?

A. I believe in '58 Mr. Woods gave me a contract one time to read and I returned it to him the next day. We could not see where we could sign it.

Q. You refused to sign it?

A. Yes, sir.

Q. Other than that attempt, have they made any effort to revise the agreement?

A. Not to my knowledge.

Q. Did you hear Mr. Woods testify regarding this conference some eight or nine months ago when you and the Stilwells and the officials of Paragon Jewell met regarding some coal that lay between you?

A. About a certain instance that he was explaining that [fol. 1056] took shape, I believe, about some changes in the underground direction of the work?

Q. That is right, when he said, I believe his testimony was that you and the Stilwells and he met to decide how a certain area of coal was to be mined?

A. Yes, sir, I believe I did.

Q. Do you recall that situation?

A. Yes.

Q. When did that occur, approximately?

A. I would say a little better than a year ago.



Q. Would you describe the circumstances of that?

A. Well, as I remember it, we thought we heard someone blasting underground and we went around to Stilwell's to see, look at their map, to see if we were maybe getting too close, because that is one thing we didn't want to do, because they employed several men underground, we had several men underground, and we did not want to cut our mine into theirs and disrupt their ventilation or have them disrupt ours. The result was we got around there and we couldn't see that we should not be that close. But what happened, what we call our Number 8 mine, we were up pretty close, almost drive up. And we were ready to start pulling pillars, but there was a block of coal to our right that the Stilwell boys said they couldn't get, they were up against a sandstone roll. Then the engineer, I believe Mr. [fol. 1057] Looney, his next time up, maybe the Stilwells had mentioned it to him, I won't say for sure, but maybe we did, but anyway, he said, why don't you get this block of coal before you start pulling these pillars out. We said set the spads, and we will get it. Right where we were ready to start pulling back, we had maybe 30, 32 inches.

Q. Was that coal that was across the line under Stilwell's—

A. (Interposing) Yes, sir, that would be on the right side of the line, of our line.

Q. Did you obtain the approval of the Stilwells before you mined that coal?

A. Yes, sir, we talked to them about it, and they said they couldn't get it because they didn't want to get it, there was a roll. They had turned entries off to go into it. They run up against the sandstone roll.

Mr. Merrell: That is all.

Cross examination.

By Mr. Katz:

[fol. 1069] Q. I see. And surely, Mr. Merritt, you felt that [fol. 1070] if things didn't go the way you thought they ought to, that you could quit?

A. After I got my investment in there, I couldn't quit.

Q. Now, Mr. Merritt, it is true that according to your understanding of this contract, you had the right to terminate this contract at any time and so did Paragon Jewell?

A. Well, it was never discussed with me that way.

Q. I didn't ask you what was discussed, I said wasn't it your understanding that you had the right to terminate this agreement at any time and so did Paragon Jewell? Wasn't that your understanding?

A. No, sir; if it had of been, I wouldn't have went there without some other understanding.

[fol. 1071] Q. Mr. Merritt, I will now hand you Petitioner's Exhibit for identification number 86 and ask you to state what that is.

A. This is a brief in the case of Kyva Mining Company.

Q. And it covers the years 1955 and '56?

A. '55 and '56.

Q. Now, I will ask you to look at the signature on that [fol. 1072] brief under the name "Kyva Mining Company" and will you tell me whose name that is?

A. That is mine.

Q. Did you sign this brief?

A. I imagine I did.

Q. And as you can see, it was acknowledged on the 19th day of May 1958?

A. Yes.

Q. Is that correct?

A. That is right.

Q. And you, of course,—

A. (Interposing) Just a minute—

Q. Yes. And you are, of course, familiar with what you put into this brief and what went into this brief, is that correct?

A. I am not.

Q. Well, where did the information come from that made up this brief? Who gave you this information?

A. Sir, I have no idea.

Q. You have no idea who gave the information to Mr. Stull that went into this brief?

A. I do not.

Q. Do you have any explanation as to where you signed this brief and had your signature acknowledged before a notary public?

[fol. 1073] A. I think I can.

Q. What is the explanation, sir?

A. In my memory, Mr. Earl Bowman came to my apartment one night in Grundy and told me he had this brief made up and as I remember it, he just said something not too much for me to worry about. I laid it right down on a little desk right there and signed my name to it, and took it downstairs to the lady to have it notarized and handed it back.

Q. Now, do you want the Court to understand you go around signing these briefs without reading and without knowing what they contain, sir?

A. Sir, I had confidence in the man at the time, and I signed several papers along about that time without reading them.

Q. Well now, I refer you, Mr. Merritt, to page 6 of this contract at the—

The Court: (Interposing) Contract?

Mr. Katz: Of this brief, as it is entitled, Kyva Mining Brief, at the letter "I" and it states thereon, see if I am correct, "The contract specified the right of termination by either party at any time, but the question never arose between the partnership and Paragon."

Is that correct or not?

The Witness: The first time I ever read that was about [fol. 1074] three weeks ago.

By Mr. Katz:

Q. Is it correct, that is all I am asking you?

A. No, sir.

Q. This is not a correct statement?

A. No, sir, that is not. Nothing like that was ever discussed between Mr. Grogan and I or Mr. Woods and I neither one.

Q. I am merely asking whether or not it was your understanding of the agreement as it states in your brief, that

the contract specified the right of termination by either party at any time, but that the question never arose between the partnership and Paragon?

A. Sir, as I told you before, I signed that, but I did not read it.

Q. You signed it but do you deny that it is the truth, what I have just read?

A. Nothing like that was ever discussed with Mr. Grogan and I that I know of.

Q. I just want one answer, was this a true statement or was it a false statement?

A. I didn't make that statement in there.

Q. Mr. Merritt, your name is signed to this statement.

A. I told you that I signed it.

[fol. 1075] Q. Well then, can you answer me this question, you admit that you signed it?

A. Yes, sir.

Q. You admit that it has this statement on here. Is that statement true or false?

A. I didn't make it.

The Court: Do you mean now?

The Witness: I didn't make it at any time.

The Court: He is asking you a question, I gather.

Mr. Katz: I want to know whether this is a true statement, whether it is his statement or not.

The Witness: No, sir, it isn't my statement.

By Mr. Katz:

Q. I know, Mr. Merritt, all I want you to tell me now is the statement, "The contract specified the right of termination by either party at any time." Is that true or false?

A. There was nothing in the verbal contract that we ever discussed anything like that.

Q. Is the statement true or false?

A. I didn't make it.

The Court: He is making the statement to you now and asking you whether it is true or false.

The Witness: Oh, now—

The Court: (Interposing) I guess that is what you are [fol. 1076] asking?

The Witness: Now I see what you mean. Sir, I don't see how I can answer whether it is true or false when I didn't make the statement and it was never discussed with me in any way, shape, form, or fashion like this.

By Mr. Katz:

Q. In other words, what you are saying is that the Persinger firm, Mr. Stull, made this statement up himself and put it in the brief and asked you to sign it?

A. Really I don't know where they got it.

Q. Mr. Merritt, I now hand you Petitioner's Exhibit Number 87 for identification, which is a brief for the Standard Smokeless Coal Company, Grundy, Virginia, for the years 1954, '55, and '56. This brief was also to the Internal Revenue Service, is that correct?

A. Yes.

Q. I believe that the date of this brief is, which you signed, was May 19, 1958, is that correct?

A. Yes.

Q. I will ask you whether or not you signed this brief, which was furnished to the Internal Revenue Service?

A. That is my signature.

Q. Was this one likewise prepared by Mr. Stull?

A. If it says it was, I guess it was.

Q. Well, it was given to you and shows that Mr. Stull [fol. 1077] is the man that was the enrolled agent?

A. That is right.

Q. Now, you will notice the affidavit which you signed on this brief, and it is the same as the other brief—

Mr. Merrell: (Interposing) Just a minute, I don't think he signed an affidavit. He signed the brief, but he didn't sign the affidavit. It is not signed under oath.

Mr. Katz: Your Honor, the affidavit says he appeared before the notary public and after being duly sworn, stated that he was one of the partners mentioned in the foregoing brief; that he has read the brief in its entirety and that to the best of his knowledge and belief, the statements made therein are true.

Mr. Merrell: But you said he signed that affidavit.

Mr. Katz: No, I am sorry, you signed the brief, and the affidavit was appended thereto with the words as I have just read.

The Witness: As I recall it, when Mr. Bowman brought these papers in to me, he just came in like that, and told me, here is a brief, it was pretty late in the night. He told me about what they were for, which I didn't understand. And I put my name on them, I went downstairs and got my landlord, which is a CPA, and got her to notarize [fol. 1078] it. Honestly, I did not read it because I had confidence enough in the man to think that he had prepared them right.

By Mr. Katz:

Q. How much schooling have you had, Mr. Merritt?

A. About sixth grade, sir.

Q. And you can read?

A. Oh, I can read and write.

Q. You can write?

A. Yes, sir.

Q. And I will now ask you to refer to page 5 of Petitioner's Exhibit Number 87 for identification and under "I" in that brief, does it not state that the contract specified the right of termination by either party at any time but that the question has never arisen between the partners and Paragon, does it say that?

A. As I said before, sir, about three weeks ago was the first time I ever saw that.

Q. You must have seen it when you submitted it.

A. No, I didn't read it.

[fol. 1079] Q. Well, I know you saw the paper, it was altogether for you to read?

A. Yes, but I didn't read it.

Q. Now, is that statement correct, true, or false, "The contract specified the right of termination by either party at any time"?

A. No, sir, not—



Q. (Interposing) That is false?

A. Not any contract talks that we have ever had, it was not true, because it wasn't discussed.

Q. You now say this statement is false?

A. As far as any dealing between Mr. Grogan and I, it is, I am very sorry to say.

Q. Is it false according to your understanding of what that agreement was and what it meant, Mr. Merritt?

A. I am sorry, I didn't get that.

Q. Isn't it true, Mr. Merritt, that not what each of you said, specifically what each of you said, but according to your understanding of what this agreement was, isn't it true that either party had the right to terminate at any time, just like you said it in here?

A. No, I didn't say it in there and I never was used to any contract like that, that either party walked off, and that has never been mine just to walk off.

#### OFFERS IN EVIDENCE

Mr. Katz: At this time, your Honor, we would like to [fol. 1080] offer the briefs in evidence as Petitioner's Exhibits Numbers 86 and 87.

Mr. Merrell: I would like to inquire as to the purpose of them.

The Court: What is the object?

Mr. Katz: The object is to discredit his testimony, your Honor, where he said there was no right to terminate. We say that he has stated that both parties did have the right of termination.

The Court: Only for impeachment purposes?

Mr. Katz: For impeachment purposes, yes, your Honor.

[fol. 1082] The Court: I will receive Petitioner's Exhibits 86 and 87 for the purposes of impeachment.

[fol. 1085] Q. Now you had no obligation, did you, Mr. Merritt, under the terms of your agreement, to go through rolls if you didn't want to go?

A. Yes.

Q. Yes what?

A. When we, when I talked to Mr. Grogan, he asked me if we were financially able to furnish an air compressor, air hammer, and necessary things to scale the top. As I told you before, in our Kyva mine, he wanted us to put in a mine like the Stilwell's, and we did buy this air compressor and jackhammer, air hammers, and we have gone through sandstone rolls.

Q. You have, but I said you were not under any obligation to go through them if you didn't want to?

The company, Paragon Jewell, could not force you to go through any roll if you came to a roll and said I am not going any further, could they?

[fol. 1086] A. When you talk about forcing, that is a different thing.

Q. You know what I mean, they had no means of compelling you to go through a roll if you got to one, and then you decided you didn't want to go any further and you said you were going to come out, there was nothing they could do.

A. We never even did discuss anything like that.

Q. What is your understanding about it?

A. I made preparations to go through these sandstone rolls. I wasn't figuring on backing out at the first one I came to.

Q. Isn't that true in Kyva that is exactly what happened, you come to a roll and you didn't want to go through?

A. Kyva?

Q. Yes, sir.

A. No.

Q. That is the one you say mined out?

A. We mined it out.

Q. What you mean by mined out is that you hit a roll—

A. (Interposing) No.

Q. (Continuing)—And you didn't want to go through it?

[fol. 1087] A. We mined it out, pulled the pillars back.

Q. You pulled the pillars back after you went to the limit, that is to the roll that you came to—

A. (Interposing) No, there has never been a roll mentioned in Kyva. We went to the boundary.

Q. Show me the boundary you went through in Kyva.  
Show me the boundary.

A. Get the map, it isn't on there.

Q. Not on here?

A. I don't think. Get the map, I can show you. Better still, I believe I have a Kyva mined out map, show you exactly what is done. It is all right if I get it!

Mr. Katz: That is not in evidence.

The Witness: Sir, this is the beginning of the Kyva.

The Court: Does the—

Mr. Katz: (Interposing) I want you to show me on this map what you mean.

The Court: Can you show him on that map?

The Witness: We went up to here.

Mr. Katz: I have handed you Petitioner's Exhibit 81.

The Witness: We bought, as I say, we bought this mine out, and after we bought him out, we drove up to here.

[fol. 1088] Mr. Katz: Just a minute, where is the Kyva mine you are referring to?

The Witness: Number 6.

By Mr. Katz:

Q. And that is marked in ink with a large letter "K"?

A. Yes, sir.

Q. Number 6 Mine?

A. That is right. We drove these mines to here.

Q. You pointed to here (indicating)?

A. Right, to Number 8 Mine.

Q. To this point here?

A. Left a pillar there and pulled the pillar back.

The Court: The Number 7 Mine had been mined by somebody else before?

The Witness: Started by another party, we bought them out.

Mr. Katz: Who?

The Witness: Mr. Lester, and we went up to here and started pulling back out to here, and to this point here.

By Mr. Katz:

Q. And you pulled all the pillars in this?

A. That is right.

Q. And you say you were still in good coal then when [fol. 1089] you found you had to stop, is that what you are telling this Court?

A. Kyva?

Q. Yes, sir, in Kyva.

A. If we could have gone on through here, we would have been in the best of coal.

Q. I am asking you this, and this is the answer I want, when you stopped mining at what you called your boundary, were you still in good coal?

A. I—Kyva was just getting into best coal up here.

Q. Were you at that point when you stopped mining, in good coal?

A. Yes, coal was good.

Q. Coal was good?

A. Coal was good.

Q. Did you not come to Mr. Woods—did you have a bad top condition in that mine?

A. No, we had a low top condition.

Q. It was a top that was such that you could not mine that coal?

A. It was low.

Q. It was too low to mine?

A. We mined it out.

Q. Could you go any further because of the low top? [fol. 1090] A. We didn't have to—

Q. (Interposing). I asked you this, Mr. Merritt, did you stop going any further because of the low top?

A. We were at the end of our lease. Even with the low top, we went ahead and finished it up.

A. Answer me this question, this is all I want. Did you stop mining because you had a low top?

A. No, I stopped mining because we were out of coal.

[fol. 1096] Redirect examination.

[fol. 1098] By Mr. Merrell:

Q. With reference to the area of coal which you were operating, who was obligated to develop the mine?

A. We were.

[fol. 1099] By Mr. Merrell:

Q. You have testified with reference to the three operations that you had on property under Paragon lease, that there was a designated area which contained a certain [fol. 1100] amount of coal?

A. That is right.

Q. Did Paragon Jewell—I don't want to lead the witness.

Mr. Katz: We don't want you to, either.

By Mr. Merrell:

Q. Was any additions made to the coal area which you had?

A. Yes, sir.

Q. Was any of the area taken from you?

A. Never.

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[fol. 1101] VIRGIL BOWLING was called as a witness on behalf of the petitioner [Merritt], and, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Merrell:

Q. During the years involved which is '54, '55, and '56, which of the partnerships are you interested in?

A. Kyva and Far West.

Q. Were you there at the time Kyva commenced operations on Paragon Jewell property?

A. Yes.

Q. Did you have occasion to discuss the agreement with Mr. Grogan?

A. No.

Q. You never discussed the agreement with Mr. Grogan?

A. No.

Q. Were you an interested party in the Far West operation when it purchased the Meadows' operation?

[fol. 1102] A. Yes.

Q. At that time, did you examine the maps to ascertain the location of the Meadows' operation?

A. Yes, as a matter of fact, I examined the mines.

Q. Did you ascertain the area of the coal involved in that operation?

A. Yes.

Q. Did you hear Mr. Wesley Merritt, G. W. Merritt's testimony regarding the first map he received after the Meadows buy-out?

A. How was that?

Q. Were you present in the courtroom while Mr. G. W. Merritt was testifying?

A. Yes.

Q. And he testified that the Meadows' purchase was made in November 1956?

A. Yes, I would say, I don't remember the dates.

Q. Were you present when he testified regarding the first map that was submitted to you?

A. Yes.

Q. After you purchased the Meadows' operation?

A. Yes.

Q. And did that map cause you any concern when you saw it?

A. Yes, very much.

[fol. 1103] Q. Did you see the map?

A. Yes.

Q. What was the matter that concerned you?

A. Well, it cut off part of it. They drew a line across part of it.



Q. Part of what?

A. Part of the mines, I mean the projections that was on there, they had drawn a line across it.

Q. What was the result of that line insofar as area of that coal involved?

A. Shortened the life of the mines, it didn't go as far.

Q. What action did you take?

A. Well, I discussed it with my partner, Mr. Merritt.

Q. That is G. W. Merritt?

A. Yes.

Q. And did you talk to anyone from Paragon Jewell?

A. Not before I talked to him.

Q. After you talked to him?

A. No, not until the two of us was together and we talked to Mr. Woods.

Q. And what was the result of your conversation with Mr. Woods?

A. Mr. Woods told us to disregard that line, that they [fol. 1104] shouldn't have put that on there, that we would go where we first started to go to.

Q. In other words, Mr. Woods told you that the map that was submitted to you was incorrect insofar as your area of coal was concerned?

A. Yes.

Q. Mr. Bowling, are you still interested in the Far West Company?

A. Yes.

Q. Still mining coal on Paragon Jewell?

A. Yes.

Mr. Merrell: No further questions.

Cross examination.

By Mr. Gillespie:

[fol. 1105] Q. Did you, you had everything you made in your life put in the machinery to mine?

A. That is right.

Q. That is all you had, an investment?

A. That is all a fellow can put anything into that, that is about all he has.

Q. That is all you had money invested in was machinery to mine with, wasn't it?

A. That, and about a year's work there before I got to run any coal.

[fol. 1106] Q. They paid you so much a ton for that coal on the Friday or Saturday following the time that you dumped it in the tippie, didn't they?

A. They paid me like they did everybody else. When I put the coal over the scales, but if I didn't get it over there, didn't get anything, regardless of whether I was running rock or what have you, I didn't get anything until it went over the scales.

[fol. 1109] Q. But you felt you did have to talk to him before you could get permission to acquire Mr. Meadows' mine?

A. Yes, before we could buy the lease.

Q. And the reason was you never acquired any interest in that coal out there in front of you and neither had Mr. Meadows, had he?

A. Yes, I think Mr. Meadows had put an awful lot into that.

Q. What consideration had passed from Mr. Meadows to Paragon for any of that coal that was there still in the mountain unmined and beyond his headings?

A. The development of the mines was worth a lot.

Q. What do you mean by development of the mine?

A. Well, when I went and looked at the mines, it was a very pretty mine, good coal heights and he had went [fol. 1110] through some pretty rough going.

Q. In other words, he was taking out the coal as he drive his headings?

A. In some cases, he was taking out the rock.

Q. And he was just like your company, he knew that he would get paid for the coal as he took that out, but would not be paid for the rock when and if it appeared?

A. Yes.

Q. And all the coal that you or your company had mined from any of the Paragon leases has been delivered to Paragon's tipple?

A. We have had no occasion to take it any place else.

Q. You never had any right to take it any place else, did you, because it was Paragon's coal, wasn't it?

A. I don't know about that. I never tried to take it any place else.

Q. And the only people that you looked to for your money was Paragon Jewell Coal Company, wasn't it?

A. When I put coal down there, I did.

Q. You didn't have to look any further for your money?

A. No.

Q. And it made no difference to you, when you dumped that coal in the tipple whether Paragon sold it for a profit or not?

A. Sure it made a difference to me whether they sold it [fol. 1111] for a profit or not because if they started selling it all at a non-profit, first thing you know they would be cutting the price of it.

[fol. 1125] JAMES O. WATSON was called as a witness on behalf of the petitioner [Merritt], and, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Merrell:

Q. Are you one of the petitioners in this case?

A. I am.

Q. Which of the three partnerships involved did you have an interest in during the years involved?

A. I had an interest in Standard Smokeless Coal Company and Kyva Mining Company.

Q. When did your interest in those partnerships terminate, if you know?

A. February 28, 1956.

Q. Did you participate in any of the discussions with Mr. Grogan regarding the Standard Smokeless operation [fol. 1126] that commenced during the Fall of 1953?

A. Yes, I did. Mr. Lee Merritt made the first contact with Mr. Grogan and as he has so testified, and then Mr. G. W. Merritt and myself, went to Whitewood and saw Mr. Grogan and talked to him.

Q. Did you hear Mr. Wesley Merritt's testimony?

A. I did.

Q. Did he answer truthfully regarding the terms of the agreement which you discussed with Mr. Grogan?

A. His understanding was the same as my understanding.

Q. Did the agreement involve a designated area of coal?

A. It did.

Q. And what about the right of termination of the agreement?

A. That was not mentioned.

Q. Was anything discussed regarding the price which you were to receive for the coal that Standard Smokeless produced?

A. Yes, sir, price per ton was given to us.

Q. Was there any understanding regarding changes in that price?

A. We were told it would go up and down according to fluctuations in the market.

Q. At that time, were you discussing one or two operations [fol. 1127]?

A. We discussed first the Standard Smokeless, and then at the same visit, that we were interested in putting in a second operation.

Q. What was that second operation?

A. That was the Kyva Mining Company.

Q. Did you discuss the agreement governing the Kyva operation with Mr. Grogan?

A. Yes, we did.

Q. Were the terms of that agreement the same, or different from those of the Standard Smokeless lease agreement which you just testified to?

A. They were the same.

Q. Were you there at the end of the year 1953?

A. I was.

Q. Were you acquainted with the financial status of Kyva at that time?

A. Yes, I was.

Q. Do you recall what its indebtedness was?

A. Our indebtedness at that time—

Mr. Gillespie: (Interposing) We object. What is the materiality, your Honor?

The Court: What is the purpose of this?

Mr. Merrell: I think it has a bearing on the question of the tenure of the agreement. I was going to show from [fol. 1128] this witness that they were substantially in debt and the only means that they felt they could recover this indebtedness was to produce the coal which they felt they had under lease.

The Court: Well, I can't—all right, you are objecting on the grounds of relevancy. I will overrule the objection.

The Witness: At the end of 1955, Kyva had been in operation slightly over a year. At that time our indebtedness was in the neighborhood of \$30,000.

By Mr. Merrell: .

Q. Were you there when they bought out the Sampy Lester Mine or was that after your time?

A. That was after I left the operation.

Mr. Merrell: Nothing further.

Cross examination.

By Mr. Katz:

Q. Mr. Watson, as a matter of fact, you say you were in debt to about \$30,000, and you all went to Paragon and borrowed some money from them, didn't you?

A. No, sir.

Q. Never did?

A. Not while I was there, no, sir.

Q. Did Standard ever?

A. Not while I was with them, no, sir.

[fol. 1129] Q. Did any of these firms ever borrow any money from Paragon, Standard or Kyva?

A. After I left there, I have no knowledge.

Q. When did you leave?

A. February 28, 1955.

Q. Well, at the end of '55?

A. '56, excuse me.

Q. February 28, '56?

A. Yes, sir.

Q. So at the end of '55 when you had this \$30,000 obligation, you pulled out yourself personally two months later, and you don't know where they got the money to continue on their operations, do you?

A. I have no knowledge of any financial transactions after I left.

Q. After you left. Mr. Watson, what background and experience do you have in business before you came into this Standard and Kyva mines?

A. I had been in mining industry for 28 years.

Q. As a result, of course, you are familiar with mining contracts and agreements, et cetera, are you not?

A. Yes, sir, I am.

Q. You also know the solemnity of contracts and what they mean?

A. Yes, sir, I do.

[fol. 1130] Q. And you are very careful when you enter into negotiations for a contract as to what they will contain and what your obligations will be?

A. Yes, sir. When we first met Mr. Grogan, I asked Mr. Grogan for a written contract.

Q. Just answer my question first, you are familiar?

A. Yes, sir.

Q. Now, Mr. Watson, as a good businessman, wouldn't it concern you very much to know what the termination arrangements would be with respect to a contract you were entering into?

A. It certainly would.

Q. And yet, you say that you all didn't discuss it?

A. We didn't discuss it.

Q. And you didn't bring it up?

A. No, sir.

Q. And you didn't know whether you would have to mine or not mine if you got into trouble there?



A. Well, I knew this, we had a certain boundary of coal which was given to us and told we could mine it out. If we had not had that assurance, we certainly would never have invested the sums of money that we did on the property.

[fol. 1133]      Redirect examination.

By Mr. Merrell:

Q. I believe you testified that you were assured that you could mine this boundary of coal or you would not have gone into it?

A. We certainly would not.

Q. And if you had left the operation for some reason, is there any way you could have recovered the time, effort, and money that it took to develop the property?

A. No, that development, effort, and work and expense would have been lost.

[fol. 1139] VIRGIL BOWLING was recalled as a witness on behalf of the petitioner [Merritt], and having been previously duly sworn, testified further as follows:

[fol. 1147].      Further cross examination.

[fol. 1148]      By Mr. Gillespie:

#### STIPULATION

The Court: This is the stipulation, is it?

Mr. Gillespie: Yes. It has been stipulated that the entire purchase price of \$3500 paid by Kyva Mining Company to Sampey Lester has been added to the depreciable assets of Kyva Mining Company and the amount depreciated over a two year period.

Mr. Merrell: And segregated as \$1500 for equipment and \$2,000 for mining rights.

The Court: Is that agreed-upon by both parties?

Mr. Gillespie: Yes.

Mr. Merrell: That is agreed upon.

[fol. 1151] GEORGE G. BEALL was called as a witness on behalf of the petitioner [Merritt], and having been first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Merrell:

Q. Mr. Beall, a stipulation shows that you are a partner in the Sally Mining Company and the other partner is [fol. 1152] Mr. Lloyd Conley. What is the Sally Mining Company doing at the present time?

A. Sally Mining Company is mining coal on what is called number two lease of Paragon Jewel property.

Q. How long have they been mining coal on that property?

A. Been mining coal since August, 1955.

Q. Before Sally Mining Company started mining on this property did you have any discussions with officials of Paragon Jewel regarding the operation?

A. Before we went on the property to mine?

Q. Yes.

A. I did.

Q. With whom did you discuss it?

A. With Mr. C. A. Clyborne.

Q. And would you tell us what transpired during those discussions?

A. This was a telephone conversation after I had contracted to buy the equipment from Stone and Blankenship.

Q. Were Stone and Blankenship operating on the property at that time?

A. That was my understanding.

Q. And had you had any discussions with Stone and Blankenship regarding the operation?

A. Only as pertaining to the purchase of the equipment [fol. 1153] thereon and what they were doing there, yes.

Q. Why did you contact Mr. Clyborne?

A. After I contracted to buy the equipment which was already there serving the purpose of mining I wanted to get clearance and approval from the authority of Paragon Jewel. I had met Mr. Clyborne many years before, I didn't think he remembered me, and I called him up. I think it was the night that I made a temporary contract to buy the equipment.

Q. Did Mr. Clyborne or Paragon Jewel have any interest in the equipment?

A. Yes, they did.

Q. What was the nature of that interest, if you know?

A. They had a first mortgage on the equipment.

Q. And did you reach some agreement with Mr. Clyborne?

A. I did.

Q. What was that agreement?

A. The agreement was that after I had informed him that I would pay cash for Stone and Blankenship's equity I would also pay cash to clear the mortgage. He approved of that plan and was very cordial in having us succeed Stone and Blankenship for the purpose of going on the property and mining the rest of what the lease entailed.

Q. During the course of that conversation what, if anything, was said by either you or Mr. Clyborne regarding the right of either party to terminate the agreement for [fol. 1154] mining coal?

A. There was nothing said to the best of my recollection.

Q. Was anything said regarding the question, by either party, of who would be entitled to claim depletion?

A. No, sir, the word "depletion" was not mentioned.

Q. Did you ever discuss the agreement with Mr. Woods?

A. No, sir, I didn't know Mr. Woods at the time at all. I had never met him. I had never known him. My one contact was the telephone conversation with Mr. Clyborne. It was several weeks or months after before I ever met Mr. Woods.

[fol. 1167] SHERMAN MEADOWS was called as a witness on behalf of the petitioner [Merritt]; and having been first duly sworn, was examined and testified as follows:

Direct examination.

Q. Mr. Meadows, it has been stipulated that you were the owner of the Meadows Coal Company.

A. Yes, sir.

Q. As I understand it, it mined coal on property that Paragon Jewel had leased beginning in 1954?

A. Yes, sir.

Q. Do you recall when you started mining on the property?

A. When I started mining on the property?

Q. Yes.

[fol. 1168] A. I can't think exactly the date on that that I started running coal, but I started some time in March, it seems to me, in '54.

Q. Prior to starting your operations did you discuss the matter with any officials of the Paragon Jewel, with any person representing Paragon Jewel?

A. Yes, sir, when I went there and leased the coal I talked to Mr. Grogan.

Q. Now, Mr. Meadows, will you tell us what transpired during your discussions with Mr. Grogan?

A. Well, he laid me off a boundary of coal.

Q. What do you mean by laid you off a boundary of coal?

A. Well, sir, when I first went there I asked him about a mine and I told him I wanted a place to put in two mines close together where I could switch my equipment from one mine to another mine, and he said he only had one place like that and he doubted whether I was financially to put that operation in or not.

Q. Doubted whether you were—

A. Financially able to put those mines in the way they would have to be put in to get the coal.

Q. Did he agree to give you an operation consisting of two mines?

A. So I talked on with him. Later he decided—he and I went out on the surface and he showed me how large a [fol. 1169] boundary of coal at which I was supposed to mine.

Q. He showed you on the surface of the land, is that what you are referring to, Mr. Meadows?

A. Yes, sir. Now that is the front of it, didn't go all the way around or anything like that.

Q. Did he show you in any other manner the area which you were to mine?

A. Well, he had a map of the property, big map, and he showed me on the map. That was before that we went out to the property and looked at the mine.

Q. After you commenced mining operations were you given any mining maps?

A. After?

Q. After you started your operation?

A. Yes, sir.

Q. Did these maps indicate anything with reference to the boundary of coal?

A. Yes, sir, they did.

Q. Now what was your obligation with reference to the coal within the area that had been designated to you?

A. Didn't quite understand you, sir.

Q. What was your responsibility or obligation with reference to the coal in the area designated to you?

A. Well; in other words, I had a boundary of coal.

Q. What were you to do with that coal?

[fol. 1170] A. I was to mine that coal and take it to a preparation plant.

Q. How much of it were you to mine?

A. All the coal that I could mine.

Q. Was anybody else given the right to mine in that area?

A. No, sir.

Q. How long could you continue to mine the coal in that area?

A. I started mining coal there in '54 and I sold out there in '56.

By Mr. Merrell:

Q. What, if anything, was said between you and Mr. Grogan as to the right of anyone to terminate your agree-[fol. 1171] ment to mine this coal?

A. Was there anything? My agreement was to mine that coal under state and federal mining laws. I had that boundary of coal to mine.

Q. Was it your understanding that you could mine it to exhaustion?

A. Yes, sir.

Q. Was there anything said regarding any buildings that you would place on the mine premises?

A. Yes, sir, he told me if something happened I couldn't mine that coal I couldn't take any buildings or any tipples down under the lease which the company had.

Q. Did you ever borrow any money from Paragon Jewel?

A. No, sir.

Q. How many shifts did you run when you started operating in '54?

A. How many shifts?

Q. Yes.

A. Well, we run two shifts part of the time.

Q. When you started mining did you have any planned tonnage which you sought to obtain per day?

A. Well, I would say there over about something like a year we got up to around 300 tons, somewhere along there. I wouldn't say definitely.

Q. Why did you want to get up to 300 tons per day if you [fol. 1172] could?

A. Well, we had to do that in order to take care of the overhead and expense and cost.

Q. What do you mean by overhead and cost?

A. In other words, the cost to the mines.

Q. And the cost of operating?

A. That's right.

Q. What about the cost of installation of mine?

A. Well, that includes what I mean.

Q. Mr. Meadows, was there any agreement at this time you commenced mining operations as to the engineering services?



A. Yes, sir.

Q. What was that agreement?

A. Well, the agreement was that the company would furnish an engineer but I had to pay him.

Q. What did you do for power at your mine, electrical power?

A. Well, the company had a line, a power line that come in there, and we attached on that, and they charged me—right off I just don't remember how much it was a ton until I could check back on the books.

Q. You bought company power at a tonnage rate?

A. Sir?

Q. You bought the company power at a tonnage rate?

A. Yes, pretty sure that's right. But anyway it is on that [fol. 1173]—I had a record of it.

Q. Mr. Meadows, could I ask you how much education you have had?

A. Oh, I haven't—I had third grade, was as far as I got.

Q. So far as you got was the third grade?

A. Yes, sir.

Q. I believe you testified you sold your operation to—well, to whom did you sell it?

A. I sold it to Lee Merritt, Wesley Merritt, Virgil Bowling.

Q. I show you Petitioner's Exhibit 84, directing your attention to page 2 thereof. Does your signature appear thereon?

A. Yes, sir.

Q. Are you able to ascertain from this document what it is, Mr. Meadows?

A. Yes, sir, that is the coal mine and also the equipment.

Q. Is that the agreement that you executed with the Merritt interest?

A. Yes, sir.

[fol. 1175] Cross examination.

By Mr. Gillespie:

Q. Mr. Meadows, you say that Mr. Grogan took you out on the ground and showed you an area of coal that he wanted you to mine?

A. Yes, sir.

Q. Now, did he tell you that he wanted you to mine coal and deliver it to Paragon's tipple?

A. Yes, sir, he did.

Q. And he said he would pay you so much a ton for doing [fol. 1176] that work. That is a fact, isn't it?

A. He told me when I went there that he would—the price would be based on the market price.

Q. Didn't he tell you what the price that he was paying for mining and delivering that coal to Paragon's tipple was at that time?

A. Yes, sir.

Q. Do you recall what it was?

A. At that particular time?

Q. Yes.

A. Definitely I couldn't answer that right now.

Q. But it was a fixed sum per ton and that was your compensation for mining and delivering that coal to the tipple, wasn't it? That was what Paragon was going to pay you for it?

A. At that time, but the price was supposed to change according to the market price; it would vary.

Q. Well, whatever the price was, whether it went up or down, but that was what you were getting paid to do, wasn't it?

A. Yes, sir.

Q. And you never agreed to pay Paragon anything for any unmined coal, did you Mr. Meadows?

A. Well, sir, my understanding was when I went there I had coal and I was supposed to mine that coal and take it to their preparation plant.

Q. That's right, and you say that nothing was said—[fol. 1177] strike that please.

You say that you don't remember anything being said about termination?

A. In other words, I was supposed to mine the boundaries of the coal.

Q. I don't believe you understood my question.

In answer to a question asked you by Mr. Merrell, you said that nothing was said about your right to stop mining or the Paragon Jewel Coal Company's right to stop you from mining.

Did you understand the question, Mr. Meadows?

A. Repeat that again. I am hard of hearing.

Q. Perhaps I should stand up. Maybe that is the trouble.

I believe you have testified that you didn't recall anything being said either by you or Mr. Grogan when you were talking to him about doing this mining there, about terminating the contract. Is that right?

A. Well, he told me that I had that boundary of coal as long as I mined it according to the State and Federal mining laws, but I couldn't go in there and mine just all the coal out, and he made that clear.

Q. He told you you couldn't go in and just mine in any way, any way that you wanted to, but you had to mine in accordance with State and Federal mining laws and in such manner as may be projected by an engineer which they [fol. 1178] would select, and which you would have to pay for?

A. Right.

Q. And that they were interested in recovering the greatest amount of coal from their lands that was possible?

A. Yes, sir.

Q. Now, did you discuss anything about whether you could quit any time you wanted to, or whether Paragon could terminate your services any time they wanted to?

A. No, sir. In other words, I was supposed to go ahead and mine that coal out, providing I mined it according to the State and Federal laws.

Q. Well, Mr. Meadows, now if you were supposed to mine it all out, why did Mr. Grogan tell you that in case you couldn't mine it, you would have to leave any buildings on the land?

A. Well; there was something could have happened to me; many different things could have happened to me during that time.

Q. You could have pulled out or you could have stopped for various reasons, couldn't you?

A. No. In other words, if I drove it in there, and he had stopped me for not driving to the State mining laws, and he stopped me, I couldn't have taken the equipment with me.

Q. And if you started mining in such manner as would [fol. 1179] have resulted in what is termed hogging the coal, he would have stopped you, wouldn't he?

A. Sure. If I was going to mine not lawfully and so forth, he probably could have stopped me. Any lease I have ever had was that way.

Q. In other words, Paragon had an engineer that was going to do all the inside engineering work for all of the mines on their property, didn't they?

A. I don't know anything about any of the mines excepting mine because I never fooled with any of them.

Q. Well, he told you that they would select the engineer to make these projections for you to mine, but that you would have to pay them so much a ton, and that was part of the deal?

A. Yes, sir.

Q. Now you further say he said, that if something happened that I couldn't mine, that I couldn't take any of the buildings off the land.

That is what he told you, wasn't it?

A. Anyway, I wasn't supposed to remove any buildings.

Q. Now was there anything else that Mr. Grogan told you that imposed any obligation whatsoever upon you in case you couldn't mine the coal for any reason?

A. Well, he didn't tell me that there wasn't—he didn't tell me he wasn't holding me responsible for it.

[fol. 1180] Q. But the only thing that he told you was that you couldn't remove any buildings. So far as you know, you had been under no obligation to pay Paragon anything or the land owners anything whatsoever in case you couldn't mine the coal. That is right, isn't it?

A. I don't know what would have happened there; it's just according to how it would have come about.

Q. You never agreed to assume any other obligation, did you, Mr. Meadows? If you had, you would have known what they were, wouldn't you?

A. I don't quite get you.

Q. You never agreed with Mr. Grogan to assume any obligation to Paragon or any other person in case you failed to mine or were unable to mine the coal underlying its land. If you had agreed to make any payment or assume any other obligation whatsoever, you would know what it was, wouldn't you?

A. Well, I was obligated there to pay for the equipment and the power and the engineer, and I paid for the lumber and all of my tools, metal and so forth, that I invested on the property, and if I had the least bit idea that they could run me off over night, I wouldn't have invested my money there, if that is what you are getting to. Because that is the first lease I ever had that I didn't have a written lease. I made three or four trips up to see Mr. Grogan before I accepted the lease, for the reason I didn't get a written lease [fol. 1181] on it, because that is only the first one.

[fol. 1182]

Redirect examination.

By Mr. Merrell:

Q. Were you a licensed mine operator when you were working here, Mr. Meadows?

A. Sir?

Q. Were you licensed by the State of Virginia?

A. Yes, sir.

Q. What does the mine inspector do if you don't mine property?

A. Close you down.

[fol. 1183] Q. Did he inspect your mines from time to time?

A. Yes, sir.

Q. Who did he hold responsible for your operations?

A. He held me responsible.

LLOYD CONLEY was called as a witness on behalf of the petitioner [Merritt] and, having been first duly sworn, testified as follows:

[fol. 1184] Direct examination.

By Mr. Merrell:

Q. Mr. Conley, it has been testified by your partner in the mining company that you commenced mining operations on property which Paragon had under lease in August, 1955. Is that correct?

A. Yes, sir.

[fol. 1185] Q. Did you contact any official of Paragon Jewel to determine—who determined the terms of the agreement under which you were to move to the property?

A. Yes, sir, I talked to Mr. Woods.

Q. Where did you talk to Mr. Woods?

A. Down at the mining office, there at his office he had there at the tipple.

Q. Was this before you went onto the job?

A. Yes, sir, before we went.

Q. Would you tell me what Mr. Woods told you, advised you regarding the operation?

A. Yes, sir. He told me that there we would be—all that was required down there, he said for us to mine according to the state mine laws and the federal laws, and that there would be—I believe it was three cents a ton for the engineering, five cents a ton for road, and 12½ cents a ton for the power, and 2½ per ton for rejects. That would be cut out of the price of the coal.

[fol. 1186] Q. Now you and—did you and Mr. Woods discuss any area of coal that would be involved in your operation?

A. No, sir, we didn't. He just told me—I just told him we were taking over the lease, and I presumed that those maps that were up there at the mines was the coal that we were supposed to mine, and later on, I thought we was running out of area to work, and I went down and talked to



Mr. Woods, and he got out the big map that they have there and showed me the area which we had still to go on, which we would have had—if we hadn't ran into some rolls we would have around ten years' work there or longer.

Q. What did he say to you with reference to this area of coal that was shown to you on the map?

A. He just said that we had plenty of coal to mine there, and that was all that was ever said.

Q. Was anything ever said to you regarding the termination of the agreement or the right to terminate?

A. No, sir.

Q. Was anything ever said regarding the right to claim depletion?

A. No, sir. I never heard anything about depletion until [fol. 1187] 1936. That was the first I heard anything about any depletion or knowed anything about any depletion.

Q. Why were you willing to enter into that agreement with Paragon Jewel?

A. I don't quite understand.

Q. The agreement to take over this operation?

A. Well, we seen that there was a good territory of coal there, and we wanted somewhere where we could settle down and stay and not just be going from place to place to work.

Q. What did Mr. Woods advise you regarding what was to be done with the coal after you mined it?

A. Well, either we was to bring it down to their tippie and dump it—

Q. You were to be paid on what basis?

A. By the ton; so much per ton for delivering it down there, all the coal, the coal that could be used.

Q. If you did not deliver any coal to Paragon, what claim did you have against them for any compensation?

A. Not anything.

Q. Was anything said to you regarding the price that you would be paid for your coal?

A. No, there was not; what it was paid per ton.

Q. Was there anything said regarding possible changes in the price?

A. No, there wasn't anything as I recall.

[fol. 1188] Q. Has the price that you received changed during your tenure?

A. Yes, it has, it has gone up and gone down.

Q. Do you know the reason for the change?

A. No, sir, I don't. It was told that they couldn't sell their coal, that they had to compete in price with others around there.

Q. Now let's see, you mean when your price went down, what would they say again?

A. Well, it was the understanding that they had competitors there that they had to compete prices with in order for us to operate.

Q. Are you still mining on Paragon Jewel's leased property?

A. Yes, sir.

Q. Under your agreement as you understood it, who was obligated to develop the mine and produce the coal?

A. We were.

Q. Has Paragon Jewel always taken all the coal you could produce?

A. Yes.

Cross examination.

By Mr. Gillespie:

[fol. 1192] Q. Have you or Mr. Beale ever paid or agreed to pay Paragon Jewel Coal Company for any of the coal which was still under that mountain and unmined at the time you went in there?

A. Didn't have any cause to.

Q. You have no property interest whatsoever in any [fol. 1193] of the coal that was unmined?

A. Well, I don't know, we just had a lease up there, and I don't know whether I owned it or didn't own it. I figured the coal was there for me to mine, and that is all I know. I can't answer your question on that just the way you would like for me to, because I don't know.

[fol. 1243] FRANK H. WOODS was called as a witness on behalf of the Petitioner [Paragon] and, having been previously duly sworn, testified further as follows:

[fol. 1244] Direct examination.

By Mr. Katz:

Q. Mr. Woods, both Mr. Merritts have testified that when they started in the operation of the Standard Smokeless Coal Company that they had a map and that they were pointed out a specific boundary of an area of coal which they could mine to exhaustion.

Now, at the time Standard Smokeless came up to go into operation, I will ask you whether or not Petitioner's Exhibit 75 was then the only map that would show the development of the Brown Heirs' No. 1 tract, which is the tract where Standard Smokeless went?

A. Yes, sir, this is the most recent map we had at that time.

Q. And what was the date of that map again?

A. August 15, '53.

Q. Do you remember when Standard Smokeless of the Merritt group started in their operations?

A. I have the date—sometime after that; shortly after that.

The Court: What exhibit number is that?

Mr. Katz: Seventy-five.

By Mr. Katz:

Q. Now, Mr. Woods, will you explain to the Court whether or not the Merritts could, based upon the information then available, have been given a specific area of coal to mine to exhaustion?

A. No, sir.

[fol. 1246] Q. All right, now continue.

A. This property extends over a mile and a quarter to a mile and a half in this direction, which shows on the back

[fol. 1247] of the map, which you could see if this map were folded up on the wall.

The Court: "In this direction" means the top of the map?

The Witness: Yes, sir, extending from the crop line to the top of the map it is possibly a mile and a quarter or a mile and a half to where it comes out on the other end.

These mines were all driving in the same general area as that mine. We knew later on we would have other mines driving into the same general area, and we did not lay off any specific area of coal to mine because it has already been shown that some of these fellows over here quit. When they start we have no way of predetermining how much equipment the man is going to buy; or they say, we want to run 200, 300 tons of coal a day, but until they have proven themselves, we just don't know how far they are going, and their projections are set up like these are here, and as he develops if he buys more equipment and so forth to mine more coal, then we give them a different—add to the amount of coal they get to mine there.

But on this property—altogether on this property we have had 10 or 11 openings and only three of those openings have mined nearly to the center of the property as we had it projected. We have to recover on this lease 85 per cent or more of the merchantable coal.

Well, we have this property, the Stilwell property, the [fol. 1248] property at the back of here, what we refer to as our Binney's Branch property. All of that has to be coordinated; that is the reason we have one engineer to do the work.

By Mr. Katz:

Q. You said Stilwell property—

A. Stilwell mine; I meant McNally property on which Stilwell started his mining operation.

We cannot predetermine when these men start out whether they will go 10,050 feet or 290 feet. It is impossible for us to do it the way we have to project our overall pattern of the mines.

[fol. 1273]

39 T. C. No. 22

BEFORE THE TAX COURT OF THE UNITED STATES

Docket Nos. 84122-84126, 90765, 90766

ROBERT LEE MERRITT and WINNIE MERRITT, et al.,<sup>1</sup>  
Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

OPINION—Filed October 31, 1962

1. Petitioner Clyborne acquired leases on coal properties and assigned them to petitioner Paragon, of which he was controlling stockholder, for overriding royalties. Respondent disallowed all or a part of the overriding royalties as deduction to Paragon and taxed them as ordinary income to Clyborne. *Held*: 25 cents per ton of the 30-cent-per-ton royalty paid by Paragon to Clyborne was in fact a royalty, reasonable in amount, and is deductible by Paragon as an ordinary and necessary business expense, and the difference between 25 cents per ton and the royalties and overriding royalties paid by Clyborne to others is taxable to Clyborne as capital gain under section 631(c), I.R.C. [fol. 1274] 1954. The remaining 5 cent per ton paid by Paragon to Clyborne represents a nondeductible distribution by Paragon, taxable as a dividend to Clyborne.

2. Paragon entered into oral contracts with petitioners Merritts, Bowling, and Watson under which the individual petitioners mined coal from properties under lease to Paragon and delivered it to Paragon's tippie and cleaning plant, for which they were paid a fixed amount per ton by Paragon. *Held*: The individual petitioners did not acquire an economic interest in the coal in place and are not entitled

<sup>1</sup> Proceedings of the following petitioners are consolidated herewith: G. Wesley Merritt and Fannie J. Merritt, Docket No. 84123; Jack D. Merritt and Willa Gray Merritt, Docket No. 84124; Virgil Bowling and Gladys Bowling, Docket No. 84125; James O. Watson 3d and Lucy J. Watson, Docket No. 84126; C. A. Clyborne and Vernice H. Clyborne, Docket No. 90765; and Paragon Jewel Coal Company, Incorporated, Docket No. 90766.

to deduct depletion on the amounts they were paid by Paragon under the oral contracts. Paragon is entitled to deduct percentage depletion on its gross income from the property, less royalties paid, undiminished by the amounts it paid the contractors.

*John Y. Merrell, Esq.*, for the petitioners in Docket Nos. 84122, 84123, 84124, 84125, and 84126.

*LeRoy Katz, Esq., Carl C. Gillespie, Esq., and Frederick Bernays Wiener, Esq.*, for the petitioners in Docket Nos. 90765 and 90766.

*Bart A. Brown, Jr., Esq.*, for the respondent.

**DRENNEN, Judge:** In these consolidated proceedings respondent originally determined deficiencies in income tax and additions thereto due from petitioners as follows:

[fol. 1275]

			Deficiencies		
Docket No.	Petitioner	Year	Income Tax	Additions to tax, I.R.C. 1939, Secs.	
				294(d)(1)(A)	294(d)(2)
84122	Robert Lee Merritt and Winnie Merritt	1954	\$ 848.48	\$208.50	\$135.24
		1955	1,532.21	—	—
		1956	3,373.52	—	—
84123	G. Wesley Merritt and Fannie J. Merritt	1954	886.88	231.58	125.18
		1955	1,596.52	—	—
		1956	3,317.39	—	—
84124	Jack D. Merritt and Willa Gray Merritt	1956	3,531.81	—	—
84125	Virgil Bowling and Gladys Bowling	1955	90.18	—	—
		1956	3,342.48	—	—
84126	James O. Watson 3d and Lucy J. Watson	1954	876.83	—	—
		1955	1,975.05	—	—
90765	C. A. Clyborne and and Vernice H. Clyborne	1955	16,907.02	—	—
		1956	23,449.76	—	—
		1957	27,551.33	—	—
<i>Taxable year ended Sept. 30,</i>					
90766	Paragon Jewel Coal Company, Incorporated	1955	2,529.29	—	—
		1956	36,588.04	—	—
		1957	57,021.20	—	—



In addition, by amendment to answer<sup>2</sup> respondent has asserted claims for increased deficiencies, over and above those set forth above, in income tax as follows:

<i>Docket No.</i>	<i>Petitioner</i>	<i>Year</i>	<i>Deficiency</i>
90765	C. A. Clyborne and Vernice H. Clyborne	1955	\$8,356.13
		1956	6,936.34
		1957	9,015.27
<i>Taxable year ended Sept. 30;</i>			
90766	Paragon Jewel Coal Company, Incorporated	1955	5,434.51
		1956	5,711.56
		1957	6,481.32

[fol. 1276] Petitioner in Docket No. 90766 has made claim for overpayment for the taxable year ended September 30, 1955, in the amount of \$6,307.24.

The issues remaining for decision in Docket No. 90766 are:

1. Whether Paragon Jewel Coal Company, Incorporated (hereafter called Paragon), is entitled to deduct as royalties in each of its taxable years here involved, amounts paid to C. A. Clyborne (hereafter called Clyborne), or whether such amounts constituted nondeductible distributions of earnings and profits of Paragon.

a. The correlative issue of whether such amounts are taxable to Clyborne as royalties, as reported by Clyborne, or as dividends as claimed by respondent, is the only remaining issue in Docket No. 90765.

2. Whether Paragon is entitled to the deduction for percentage depletion with respect to its entire gross income from coal mined under contract by Standard Smokeless Coal Company, Kyva Mining Company, Farwest Coal Company, Bare Ridge Coal Company, Sally Mining Company,

<sup>2</sup> Although respondent in Docket Nos. 90765 and 90766 filed second amendments to answers, no increased deficiencies were therein asserted.

and Meadows Coal Company (hereafter called, respectively, Standard, Kyva, Farwest, Bare Ridge, Sally, and Meadows, or referred to individually or collectively as contractor or contractors), less royalties paid; or whether Paragon's "gross income from mining," for purposes of computing the deduction for percentage depletion is to be reduced by the amounts paid these contractors.

a. The correlative issue of whether certain of the contractors, Standard, Kyva, and Farwest, are entitled to deductions for percentage depletion with respect to amounts paid them by Paragon is the only remaining issue in Docket Nos. 84122, 84123, 84124, 84125, and 84126, the male petitioner [fol. 1277] in those docket numbers having been partners in one or more of those firms. The other contractors mentioned above are not parties in this proceeding.

For convenience the two principal issues will be referred to, respectively, as the "royalty issue" and the "depletion issue." Petitioners in Docket Nos. 84122-84126 are not involved in the royalty issue and respondent has taken a neutral position with respect to the depletion issue, agreeing at the trial that either Paragon or the contractors are entitled to depletion on the amounts paid by Paragon to the contractors, but not both.

#### General Findings of Fact.

Some of the facts have been stipulated and are found accordingly.

Petitioners in Docket No. 84122 are Robert Lee Merritt (hereafter called Lee) and Winnie Merritt, husband and wife, who resided in Grundy, Virginia, during the period here involved, and who filed joint Federal income tax returns for the calendar years 1954, 1955, and 1956 with the district director of internal revenue, Richmond, Virginia.

Petitioners in Docket No. 84123 are G. Wesley Merritt (hereafter called Wesley) and Fannie J. Merritt, husband and wife, who resided in Louisa, Kentucky, during the period here involved, and who filed joint Federal income tax returns for the calendar years 1954, 1955, and 1956 with the district director of internal revenue, Louisville, Kentucky.

Petitioners in Docket No. 84124 are Jack D. Merritt (hereafter called Jack) and Willa G. Merritt, husband and wife, who resided in Grundy, Virginia, during the period here involved, and who filed a joint Federal income tax [fol. 1278] return for the calendar year 1956 with the district director of internal revenue, Richmond, Virginia.

Petitioners in Docket No. 84125 are Virgil Bowling (hereafter called Bowling) and Gladys Bowling, husband and wife, who resided in Grundy, Virginia, during the period here involved; and who filed joint Federal income tax returns for the calendar years 1955 and 1956 with the district director of internal revenue, Richmond, Virginia.

Petitioners in Docket No. 84126 are James O. Watson 3d (hereafter called Watson) and Lucy J. Watson, husband and wife, who resided in Louisa, Kentucky, during the period here involved, and who filed joint Federal income tax returns for the calendar years 1954 and 1955 with the district director of internal revenue, Louisville, Kentucky.

Petitioners in Docket No. 90765 are C. A. Clyborne and Vernice Hy. Clyborne, husband and wife, who resided in Bluefield, West Virginia, during the period here involved, and who filed joint Federal income tax returns for the calendar years 1955, 1956, and 1957 with the district director of internal revenue, Parkersburg, West Virginia.

Petitioner in Docket No. 90766 is Paragon Jewel Coal Company, Incorporated, a corporation organized under the laws of Virginia on October 22, 1951, and having its principal business office in Bluefield, West Virginia. It filed a Federal income tax return and an amended return for the taxable year ended September 30, 1955, and Federal income tax returns for the taxable years ended September 30, 1956 and 1957, with the district director of internal revenue, Richmond, Virginia.

[fol. 1279]

# 1. *Royalty Issue.*

## Findings of Fact.

Clyborne moved to Bluefield, West Virginia, in 1918 as district manager for a corporation engaged in the business of acting as sales agent for coal and coke companies. He

worked for the same employer, or for employers engaged in the same business, until 1929 when the corporation for which he was working discontinued business. During this period his experience in coal production was limited to acting as manager of a small operation in Virginia. In the 1930's he entered into a coal sales contract with a sales company in Baltimore, Maryland, which was also a wholesaler of coal and coke. He organized a corporation, Clyborne, Incorporated, to act as agent for the sales company, (which it still does. In this work Clyborne became familiar with the coal fields of southern West Virginia and of southwestern Virginia.

In about 1944 or 1945, J. H. Franks (hereafter called Franks), who had been in the coal-mining business in Russell, Tazewell, and Buchanan Counties in Virginia for a number of years, approached Clyborne for financial assistance in "blocking up leases" of coal properties in the Whitewood or Dismal River section of Buchanan County, Virginia. In order to justify the necessary investment for a substantial mining operation it is necessary to obtain leasehold interests, or some interest in the coal in place in a large area of land. This often entails obtaining mining leases, or title to the minerals, from the owners of several (or, perhaps many) contiguous tracts of land containing the seam which is to be mined. Also involved is the acquisition of rights to bring mined coal over or through land [fol: 1280] which lies between the point of a proposed mining operation and the point where the mined coal is to be processed and loaded. This practice of obtaining leaseholds or title to the minerals and wheelage rights is called "blocking up leases" and might be done by an individual on his own behalf or as an agent for an operating company. It is a practice which has been prevalent in Buchanan County for a number of years and in the Whitewood area since a railroad was built along Dismal River in the 1930's.

Franks had acquired options to lease the minerals underlying a part of the Cole heirs' tract on Laurel Fork of Dismal River above Whitewood. Clyborne was generally familiar with the seams of coal underlying that area and

was particularly interested in the Raven, or Jewell, seam<sup>3</sup> which was known to be found in the area. The Jewell seam produces a relatively low volatile bituminous coal which has low sulphur and low ash content and good coking structure, and hence is suitable for the high priced metallurgical coal market. However, the Jewell seam in this area was unpredictable, containing numerous faults and pinching out entirely in places, and was quite thin, ranging on the average between 24 and 32 inches. Prior to 1950 the only major coal operator in the area was Jewell Ridge Coal Corporation, which had acquired the mineral rights on a large part of the coal lands in the general area. Also, prior to World War II, equipment had not been available to [fol. 1281] mine such a thin seam of coal at a profit. But with the advent of the railroad up Dismal River, improved mining equipment, and the demand for metallurgical grade coal, Clyborne felt that coal from the Jewell seam in the Whitewood area might be mined and sold at a profit. Consequently, he entered into an arrangement with Franks whereby Clyborne would put up the necessary capital to acquire the leases, which would be taken in the names of Franks and Clyborne, and Franks' one-half share of the capital investment would be repaid to Clyborne out of Franks' share of royalties received from the coal.

This relationship, with variations and minor exceptions, continued until about 1952 when Clyborne began acquiring leases directly in his own name. As hereinafter detailed in our findings of fact on the depletion issue, Clyborne, d.b.a. Paragon Jewel Coal Company, began construction of a coal tipple and cleaning plant on the McNeil tract in January 1951 which was completed on or after October 22, 1951. On October 22, 1951, Clyborne formed Paragon Jewel Coal Company, Incorporated, for the purpose of mining, through independent contractors, processing, and selling the coal mined from the leases referred to above,

<sup>3</sup> Testimony indicates that "Raven" or "Raven Red Ash" are the names for the seam used generally. "Jewell" is the name used locally. Sometimes the name "Jewell Ridge" is used. See findings with reference to the Brown heirs' No. 2 tract.



and transferred the tippie and cleaning plant to the corporation. Clyborne and his wife were the sole stockholders of the corporation when it was formed and Clyborne continued to be the principal and controlling stockholder, and principal officer, of the corporation throughout the years here involved.

After the corporation was formed Clyborne from time to time assigned leases held in his name to Paragon for a royalty of 30 cents per ton. The corporation assumed responsibility for Clyborne's liabilities under these leases, but [fol. 1282] in most instances the landowners were not parties to the assignment and Clyborne remained liable to them for minimum royalties, etc., under the original leases. With respect to the leases acquired in the joint names of Clyborne and Franks (and in one instance W. M. Culbertson, Jr., hereafter called Culbertson), Clyborne first acquired by assignment the outstanding interest in the leases in his own name, agreeing to assume the obligations of the assignors under the leases and pay them an overriding royalty on coal produced thereunder, usually being  $2\frac{1}{2}$  cents per ton, and then assigned the entire interest in the leases to Paragon. Paragon paid Clyborne the 30-cent royalty for which it was obligated, and Clyborne then paid the basic and overriding royalties to the landowners and others, retaining the balance himself. The basic royalties ranged from 10 cents to 20 cents per ton. The overriding royalties to Franks or Culbertson were usually  $2\frac{1}{2}$  cents per ton. Clyborne retained 10 cents to 15 cents of the royalty paid by Paragon.

The details of these transactions which are pertinent here are set out below. Generally speaking, respondent has recognized as an overriding royalty paid to Clyborne an amount equal to the overriding royalty paid to Franks or others. All of the Paragon royalty not paid out or so recognized as basic or overriding royalty was determined to be a dividend from Paragon to Clyborne.

The various properties in which Clyborne acquired an interest and later transferred to Paragon, which are pertinent here, are:



[fol. 1283] *Cole Heirs' Tract*.<sup>4</sup> The first properties in which Clyborne acquired interests were owned by the Cole heirs. By a series of 10 instruments dated August 1, 1945, to September 13, 1947, which were generally executed after Franks had negotiated and obtained the landowners' verbal commitment or option, the Cole heirs conveyed title to all the coal and other minerals underlying some 531.1 acres of surface and title in fee simple to some 228.5 acres of land to Franks and Clyborne for a total consideration of \$24,862.50.<sup>5</sup>

<sup>4</sup> On August 24, 1948, Clyborne, joined by his wife, executed a deed by which he conveyed his undivided one-half interests in the Cole heirs' tract to Clyborne, Incorporated, for a consideration of \$65,000. Clyborne specifically reserved the Cary seam from the interests thus conveyed. The Cary seam lies above the Jewell seam and produces a steam coal.

By "deed of lease" dated October 22, 1951, Franks, joined by his wife, and Clyborne, Incorporated, leased to Clyborne the exclusive right to mine, "by the deep mining method," the coal from the Jewell seam in the Cole heirs' tract, for a royalty of 20 cents per ton, with a minimum [fol. 1284] royalty of \$2,000 per year beginning on January 2, 1955. One-half of the royalties were to be paid to Franks; one-half to Clyborne, Incorporated. The lease was for a 3-year period from January 2, 1954, with automatic renewal for 3-year periods until all of the mineable and merchantable coal in the Jewell seam (based on an 85 percent recovery), was mined and removed.

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<sup>4</sup> By this and other such references, we make no findings with respect to the status of any interest in any parcel or parcels of land for purposes of section 614 of the 1954 Code.

<sup>5</sup> The parties disagree on brief as to the exact acreage involved in the conveyances, copies of which have been stipulated, and there appears to be a difference of \$50 as to the consideration paid for the minerals. Our summary is the most accurate which we can glean from the entire record. The differences appear to be due to questions as to whether a 6.1-acre tract had been included in a prior conveyance, and whether small areas excepted in some deeds for interests in minerals related to grants of easements or to grants of coal.

By "deed of assignment" dated October 22, 1951, Clyborne, joined by his wife, assigned his interests under the foregoing lease to Paragon in consideration of Paragon's assumption of Clyborne's obligations under the lease and the payment of a royalty of 30 cents per ton of coal mined under the lease, which royalty was to be distributed as follows:

	Cents
Franks	10
Clyborne, Incorporated	10
Clyborne	10

*Dennis Tract.*—On May 1, 1946, W. Clyde Dennis, joined by his wife, leased to Clyborne and Franks all the coal underlying a 114-acre tract\* for 10 years, with the privilege on the part of the lessees to renew the lease for additional 10-year periods. The royalty was to be 10 cents per ton for all coal mined by the "tunnel or drift mouth mining method" and 20 cents per ton strip mined. Minimum royalty was to be \$100 per year. Assignment of the lessees' interests was to be only with Dennis' consent, and the lessees were to remain personally liable under the lease in the [fol. 1285] event of subletting or assigning. The lessees were to purchase from Dennis, who was in the insurance business, all the insurance coverage involved in the mining operations.

By deed of assignment dated June 3, 1953, Franks, joined by his wife, assigned his interest in the Dennis lease to Clyborne in consideration of Clyborne's assumption of his obligation and of Clyborne's payment to him of a royalty of 5 cents per ton of coal mined under the lease. On the same date, Clyborne assigned his interests in the lease to Paragon, which assumed Clyborne's obligations. Paragon was to pay a royalty of 30 cents per ton to be distributed as follows:

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\* The tract described in the lease consisted of about 116 acres, of which Dennis apparently owned 114 acres in fee and 2 acres of surface only. This was originally a part of the Cole property.

	Cents
Dennis	10
Franks	5
Clyborne	15

Because of dissatisfaction with the provision for the purchase of insurance from Dennis, in a supplemental lease dated May 1, 1956, the provision was omitted and the royalty payable to Dennis was increased to 15 cents. Franks assigned his interest in this supplemental lease to Clyborne in consideration of a royalty of  $2\frac{1}{2}$  cents per ton, and on June 15, 1956, Clyborne assigned his interest to Paragon by a deed of assignment which provided for a 30-cent-per-ton royalty to be paid by Paragon and distributed as follows:

	Cents
Dennis	15
Franks	$2\frac{1}{2}$
Clyborne	$12\frac{1}{2}$

[fol. 1286] *McNeil Tract*.—By deed of lease dated August 1, 1946, a group of related landowners known as the McNeil heirs leased to Clyborne, Franks, and Culbertson all the coal underlying a 750-acre (approximately) tract. Royalty was 15 cents per ton, with a minimum royalty of \$1,000 per year for the first 2 years and \$4,000 per year thereafter. The lease provided for a wheelage charge of  $2\frac{1}{2}$  cents per ton to be paid to the lessors. It was superseded by a lease dated August 1, 1948, providing for royalty of 15 cents, minimum annual royalty of \$4,000, and wheelage of  $2\frac{1}{2}$  cents per ton.

On January 12, 1951, Culbertson and Franks assigned their interests in the McNeil lease to Clyborne in consideration of the payment to each of them of a royalty of  $2\frac{1}{2}$  cents per ton, plus \$2,500.<sup>7</sup>

<sup>7</sup> This amount represented minimum royalties theretofore paid by Franks and Culbertson and was to be reduced by any amounts which it was determined they owed Clyborne. The amount of \$2,500 was to be paid to each of Franks and Culbertson.

Clyborne, on October 22, 1951, assigned his interests under the McNeil lease to Paragon, which agreed to assume his obligations under the lease and to pay a royalty of 30 cents per ton, to be distributed as follows:

	Cents
Landowners	15
Franks	2½
Culbertson	2½
Clyborne	10

Clyborne was subsequently engaged in litigation with the lessors with respect to the provision for wheelage. He [fol. 1287] was the losing party in the litigation and was required to pay approximately \$85,000 to the lessors, plus amounts in the future. See *Clyborne v. McNeil*, 201 Va. 765, 113 S.E. 2d 672 (1960).

*Mary Day Tract.*—On March 1, 1951, Mary A. Day, joined by her husband, executed a deed conveying to Franks and Clyborne title to all the coal underlying a 67.5-acre tract, for a stated consideration of \$1,345 plus land valued at \$1,000.\*

On January 2, 1952, Franks leased his one-half undivided interests in the coal in the Jewell seam in this property to Clyborne for a royalty of 10 cents per ton, with a minimum annual royalty of \$325 until 85 percent of the merchantable and minable coal from the Jewell seam was mined. On the same date, Clyborne assigned this lease of an undivided one-half of the Jewell seam on the Mary Day tract to Paragon for a royalty of 20 cents per ton, of which 10 cents was to be paid to Franks and 10 cents to Clyborne.

Also on January 2, 1952, Clyborne leased his own undivided one-half interest in the Jewell seam to Paragon for a royalty of 10 cents per ton, with minimum royalty of \$325 per year until 85 percent of the merchantable and minable coal was removed.

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\* This was also originally a part of the Cole property.

*Brown Heirs' Tract No. 1.*—By lease dated April 28, 1952, a group of related landowners, known as the Brown heirs, leased to Clyborne the coal in the Jewell and Cary seams underlying some 889 acres. The royalty was 15 cents per ton of coal deep mined from the Jewell or Cary seams and [fol. 1288] 25 cents per ton of coal strip mined from the Cary seam, with a minimum annual royalty of \$4,000 payable until 85 percent of the merchantable and minable coal was removed.

On October 28, 1952, Clyborne assigned to Paragon his interests under the Brown heirs lease (covering tract No. 1) for a royalty of 30 cents per ton, of which 15 cents was to be paid the lessors and 15 cents was to be retained by Clyborne.<sup>9</sup>

*Tazewell Coal & Iron Company Tract.*—On July 1, 1950, Tazewell Coal & Iron Company leased to John J. Jewell all the coal in the Jewell seam underlying an estimated 200-acre tract, for a 5-year term. The royalty payable to the lessor was 20 cents per ton, except that for any month when the average gross selling price of coal at the mine was \$5.50 per ton, or over, the royalty was to be 25 cents per ton. Minimum annual royalty was \$1,000. The lease was for a term of 5 years, but on August 1, 1952, the term was extended to 10 years from July 1, 1950.<sup>10</sup>

By deed of assignment dated November 12, 1953, Jewell assigned his interests under the Tazewell Coal & Iron Company lease to Clyborne for a consideration of \$2,250. This amount was to be adjusted for the amount of merchantable and minable coal underlying the tract: If such coal in the Jewell seam exceeded 450 acres, Clyborne was to pay the assignor at the rate of \$5 per acre for such excess; if such [fol. 1289] coal was less than 450 acres, the assignor was to refund to Clyborne at the rate of \$5 per acre for such deficiency. In this assignment it was specifically provided

<sup>9</sup> No specific provision was made for payment of 25-cent-per-ton royalty to the Brown heirs in the event Paragon strip mined the Cary seam.

<sup>10</sup> The provisions of a second amendment of November 11, 1953, are not shown by the evidence.



that Clyborne, in turn, could assign his interests to Paragon, in which event, upon Paragon's assumptions of his obligations, Clyborne was to be discharged.

On December 7, 1953, Clyborne and the Tazewell Coal & Iron Company entered into an agreement by which the latter consented to the assignment of Jewell's interests to Clyborne and agreed that Clyborne could assign his interests to Paragon if Paragon assumed the obligations of the lessee, in which event Clyborne was to be fully discharged under the lease.

Also on December 7, 1953, Clyborne assigned his interests to Paragon for a royalty of 30 cents per ton, of which, 20 cents was to be paid Tazewell Coal & Iron Company, and 10 cents was to be retained by Clyborne.<sup>11</sup>

*Metcalf Tract.*—On July 9, 1953, Carl F. Metcalf (hereafter called Metcalf) leased to Franks for 10 years all the coal above and in the Allen Spring seam underlying a 136-acre tract. Metcalf was Franks' son-in-law. Royalty was 15 cents per ton.<sup>12</sup>

By instrument dated August 2, 1953, Franks assigned to Clyborne his interests in the Metcalf seam in return for a royalty of 2½ cents per ton payable to Franks. Also on August 2, 1953, Clyborne assigned his interests to Paragon, which was to pay a royalty of 30 cents per ton, of which [fol. 1290] 15 cents was to be paid to Metcalf, 2½ cents to Franks, and 12½ cents was to be retained by Clyborne.

*Hinton Heirs' Tract.*<sup>13</sup>—On September 1, 1953, Etta Hankins and other Hinton heirs leased to Clyborne all the merchantable and minable coal in the Jewell seam underlying some 1,173 acres. The lease provided for a royalty of 15 cents per ton with a minimum annual royalty of \$4,000

<sup>11</sup> No specific provision was included for payment of the 25-cent royalty to Tazewell Coal & Iron Company if the gross selling price of the coal mined reached \$5.50.

<sup>12</sup> This was also originally a part of the Cole property.

<sup>13</sup> This tract was also referred to as the Hankins tract in the record.



until 85 percent of the coal was removed. The lessee had the right to transport at no cost, over and through the leased property, coal mined from the property, but was to pay wheelage of 2 cents per ton for transportation of other coal. The Hinton heirs had previously leased to Clyborne and Frank's the Cary seam on the property, and they had leased the Jawbone seam to Franks and Culbertson. In the event of assignment, Clyborne was to be personally liable under the lease.

By deed of assignment dated January 30, 1956, Clyborne assigned his interests in this lease to Paragon. This assignment provided for a royalty of 30 cents per ton, of which 15 cents was to be paid to the lessors, and 15 cents was to be retained by Clyborne as consideration for the assignment.

*Brown Heirs' Tract No. 2.*—By deed of lease dated December 1, 1954, the Brown heirs leased to Clyborne all the merchantable and minable coal in the Jewell (called "Jewell Ridge" seam in the lease) seam and in the Cary seam underlying a 573.8<sup>2</sup> acre tract for a royalty of 15 cents per ton for coal deep mined from either seam or auger mined [fol. 1291] from the Cary seam, and a royalty of 25 cents per ton of coal strip mined from the Cary Seam. Minimum annual royalty was \$2,500 until 85 percent of the merchantable and minable coal was mined. Clyborne was given the right to transport any coal mined from the tract over and through the property without charge. Also, Clyborne could transport, free of charge, over and through the Brown heirs' tract No. 1, any coal mined from the property. But Clyborne had to pay a wheelage charge of 2 cents per ton for any other coal transported over or through the property. Clyborne could assign his interests under the lease, but he was not to be thereby relieved from his obligations under it.

On December 2, 1954, Clyborne assigned his interests under this lease to Paragon, to the extent that the latter was given the right to deep mine the Jewell (or, as it was termed in the assignment, the Jewell Ridge) seam in consideration of a royalty of 30 cents, of which 15 cents was

to be paid to the lessors and 15 cents was to be retained by Clyborne.

Clyborne also purchased either the minerals or the fee in two other tracts from the Brown heirs.

A summary of the royalties paid by Paragon with respect to the leases here involved to Clyborne and others and the amount paid to Clyborne and disallowed as royalties by respondent is as follows:

[fol. 1292]

Tract	Total royalty per ton paid by Paragon	Paid to others	Paid to Clyborne	Disallowed by respondent
McNeil	\$0.30	\$0.20	\$0.10	\$0.05
Cole heirs	.30	.20	.10	.10
Mary Day (Franks— $\frac{1}{2}$ )	.20	.10	.10	.10
Mary Day. (Clyborne— $\frac{1}{2}$ )	.10	—	.10	—
Brown heirs No. 1	.30	.15	.15	.15
Dennis (First lease)	.30	.15	.15	.10
Dennis (Second lease)	.30	.175	.125	.10
Metcalf	.30	.175	.125	.125
Tazewell Coal & Iron Co.	.30	.20	.10	.10
Brown heirs No. 2	.30	.15	.15	.15
Hinton heirs	.30	.15	.15	.15

Jewell Smokeless Coal Corporation, which has been operating in the Buchanan County area since 1951, and some of whose properties adjoin those of Paragon, made leases of the Jewell seam as follows:

1952—tonnage royalties—20 cents.

1955—tonnage royalties from 15 to 20 cents.

1956—tonnage royalties—25 cents.

1959—tonnage royalties—25 cents.

Jewell Smokeless has also taken leases in this area under which it has paid an overriding royalty of 10 cents or more per ton.

Jewell Ridge Coal Corporation, which has been mining in the same general area since about 1910, entered into leases of the Jewell seam in Buchanan County, Virginia, and McDowell County, West Virginia, during the period 1950 to 1955, calling for tonnage royalties of 15 cents and 16 cents, with higher royalty provisions for the better grades of coal and if Jewell Ridge mined the coal from the surface.

A royalty of 25 cents per ton was reasonable for Paragon to pay during the years here involved. Royalties paid by Paragon to Clyborne in excess of 25 cents per ton were distributions of Paragon's earnings and profits to Clyborne.

[fol. 1293]

#### Opinion.

Paragon claimed deductions for amounts paid Clyborne, its principal stockholder, as coal royalties. Clyborne reported the amounts he received from Paragon in excess of royalties he paid others as overriding royalties taxable as capital gains under section 631 of the 1954 Code.<sup>14</sup> Respondent disallowed all or a part of the overriding royalties retained by Clyborne as deductions to Paragon and denied Clyborne the benefit of capital gains treatment thereon. Essentially, it is respondent's position that the amounts in controversy paid Clyborne by Paragon constitute dividends to Clyborne, taxable as ordinary income, and are nondeductible by Paragon.

Respondent does not attack the existence of Paragon as a separate taxable entity, but he does claim (1) that Clyborne had no assignable interest in the leaseholds for which Paragon could be required to pay an overriding royalty, (2) that the payments of overriding royalties by Paragon to Clyborne were both unrealistic and unreasonable in amount, designed solely for the purpose of obtaining a tax advantage by providing a deduction for Paragon

<sup>14</sup> All section references are to the Internal Revenue Code of 1954 unless otherwise indicated.

of an amount which would be taxable as capital gains to its principal stockholder, and (3) that the amounts paid were not in fact royalties but were dividends.

A stockholder may deal with his controlled corporation and transactions entered into between them may be accorded recognition for tax purposes. *Sun Properties v. United States*, 220 F. 2d 171 (C.A. 5, 1955); *Differential Steel Car Co.*, 16 T.C. 413 (1951). Furthermore, taxpayers may arrange their affairs in such a manner as to minimize income tax. *Gregory v. Helvering*, 293 U.S. 465 (1935). However, transactions between a stockholder and his controlled corporation warrant close scrutiny to determine that they are not mere artificialities, correct in form but lacking substance, contrived as a disguise for distribution of corporate earnings. *Ingle Coal Corporation v. Commissioner*, 174 F. 2d 569 (C.A. 7, 1949), affirming 10 T.C. 1199 (1948). The courts are not required to accept transactions between a stockholder and his controlled corporation, wherein the stockholder makes the decision for both sides, at face value for tax purposes. *Limericks, Inc. v. Commissioner*, 165 F. 2d 483 (C.A. 5, 1948), affirming 7 T.C. 1129 (1946). It is not enough that Paragon, by virtue of the assignments between itself and Clyborne, was formally obligated to pay royalties to Clyborne. *Ingle Coal Corporation v. United States*, 127 F. Supp. 573 (Ct. Cl. 1955). The payments are deductible as royalties by Paragon under section 162(a)(3) only to the extent that such payments are "required to be made as a condition to the continued use or possession . . . of property . . ." In determining whether payments made by a corporation to its controlling stockholder are "required" we think it is inescapable that the Court must inquire into the reasonableness of the amount paid. *Limericks, Inc. v. Commissioner*, *supra*; in other words, it becomes necessary to determine what the corporation would have been required to pay for the use of the property to an unrelated party dealing at arm's length under the same circumstances.

[fol. 1295] The question of the reality of the transactions between Paragon and Clyborne, as well as the reasonable-

ness in amount of the royalties provided for therein, is a question of fact. A voluminous amount of evidence was offered by both parties on this issue and it would be impractical and would serve no useful purpose to elaborate on the details of this evidence. Suffice it to say that we have given careful consideration to all of the evidence in reaching our conclusions.

We find no basis for respondent's contention that Clyborne had no assignable interest in the leases for which Paragon could be required to pay an overriding royalty, which contention seems to be based on the premise that Clyborne was acting for Paragon in acquiring the leases. The evidence indicates that Clyborne entered into the activity of blocking up leases of coal properties in the Whitewood area in his individual capacity several years before the properties were opened up for mining and before the corporation was even organized. The Cole heirs' tract was acquired by Franks and Clyborne between 1945 and 1947, as was the Dennis tract. While the Mary Day tract was originally purchased in 1951 and the lease of the Metcalf tract was acquired in 1953, they were both parts of the original Cole property and served to round out property previously acquired. The original lease on the McNeil tract was acquired by Franks, Culbertson, and Clyborne between 1946 and 1948. Paragon was not incorporated and did not begin operation until 1951. We see no reason why Clyborne, having actively engaged in blocking up leases in his individual capacity before the corporation was formed, should not have continued this activity of acquiring subsequent leases in his own name even though [fol. 1296] he knew the properties would be operated by Paragon.

There is considerable evidence that some of the landowners in this area were not willing to grant a lease directly to a corporation but insisted on leasing to individuals on whose personal financial responsibility they could rely. The oral evidence on this point is supported by a provision contained in the Brown heirs No. 2 lease which specifically provided that Clyborne might assign the lease to Paragon but that he would be required to remain per-



sonally liable under the terms thereof. In some instances, Clyborne assigned to Paragon only the rights to mine the Jewell seam or other specific seams of coal while retaining for himself the right to mine other seams. There would also seem to be an adequate business reason for Clyborne to take the leases in his own name first and then assign them to Paragon. In the event Paragon failed, the leases would revert to Clyborne as long as he paid the minimum royalty rather than revert directly to the landowners.

For the above and other reasons we find that Clyborne was acting in his individual capacity in acquiring the leases in his own name and, consequently, that he had an assignable interest in the coal for which Paragon could be required to pay a royalty. Respondent's reliance on *Utter-McKinley Mortuaries v. Commissioner*, 225 F. 2d 870 (C.A. 9, 1955), affirming a Memorandum Opinion of this Court, is misplaced. It is distinguishable on the facts.

There can be little doubt from the evidence that Clyborne and Paragon intended the payments to Clyborne to be royalties. The written assignments specifically provide therefor, the books and records of both parties treated the [fol. 1297] payments as royalties, and there is no evidence from which to conclude that the parties intended them to be anything other than royalties.

The principal question seems to be whether the amounts paid by Paragon as royalties and the amounts received and retained by Clyborne as overriding royalties were fair and reasonable, when judged by standards of transactions entered into by parties dealing at arm's length. The parties agree that only the amount found to be deductible as royalties by Paragon should be treated as royalties received by Clyborne.

In the light of the evidence presented we could not definitely conclude that an unrelated corporation, under certain conditions, would not have agreed to pay Clyborne a royalty of 30 cents per ton for the coal mined from these properties. There was a good bit of oral testimony that a fair and reasonable royalty for Jewell seam coal with the chemical qualities of this coal would be between 30 cents and 40 cents per ton. However, there was no written



evidence to support these assertions and they may have been colored somewhat by passage of time. The period we are interested in is the period between 1951 and 1958, and the evidence indicates that the price of good metallurgical coal has been rising during and since that time. The written evidence presented tends to refute these oral assertions. As a matter of fact, judging from the evidence presented, both oral and written, it would appear that there was no precise figure that could be said to be a fair and reasonable royalty, or the going rate of royalty, on this coal in this area. It apparently was a question of bargaining on each lease, and the numerous variables in [fol. 1298] circumstances and personalities appear to have made the price equally as variable, within limits. However, using our best judgment based on all the evidence, we have concluded that an unrelated corporation in Paragon's position, whose officers had available all the information Clyborne had as an officer of Paragon, would not have been required to pay more than 25 cents per ton as royalty for the coal mined under the leases here involved.

The written evidence introduced in the form of leases held by Jewell Smokeless Coal Corporation and Jewell Ridge Coal Corporation, both being corporations operating in the Jewell seam in Buchanan County, indicates that those corporations were able to acquire the right to mine the Jewell seam in that area by paying royalties ranging from 15 cents per ton to 25 cents per ton. Clyborne himself was able to acquire some of the leases here involved for royalties ranging between 15 cents and 20 cents per ton.

We recognize that the practice of obtaining leases and assigning them to operating companies for an overriding royalty was prevalent in this area and that all of the operating companies knowingly paid overriding royalties on some of their leases. Consequently, we do not think it unreasonable that Clyborne should charge Paragon an overriding royalty for leases he assigned to it. With respect to the earlier leases, Clyborne and Franks went to considerable trouble and some expense in blocking up those leases. The evidence does not indicate how much time and effort Clyborne might have spent in obtaining the later

leases which he took directly from the landowners in his own name. We do know that in the latter instances he assigned the leases within a relatively short time after [fol. 1299] he acquired them at an overriding royalty rate of 15 cents per ton. However, the date of execution of the leases does not indicate how much time might have been spent in working out the agreement. Also, Clyborne assumed liability for and remained personally liable for the minimum royalties under these leases, which totaled a considerable amount each year. We think these and other factors justify Clyborne in charging even his own corporation a reasonable overriding royalty.

We do not think the relationship between Clyborne and Paragon should cause us to deny that Clyborne may have been able to make bargain purchases of the leases which he should be entitled to pass on to his controlled corporation at a profit to himself as long as the corporation was not required to pay more than a reasonable royalty under the circumstances. Clyborne's good fortune should not control the question of whether the royalty paid by Paragon was reasonable and required. Judging from the royalties paid by other companies operating in the area, Clyborne apparently was able to make some bargain purchases in acquiring these leases at a 15-cent royalty rate. Furthermore, Paragon was able to earn a reasonable profit even after paying a 30-cent royalty. However, we do believe that the overriding royalty charged by Clyborne was excessive for what he had to give to Paragon and also forced the total royalty paid by Paragon above the amount that would have been paid by an unrelated corporation dealing with Clyborne at arm's length under the same circumstances.

The preponderance of the evidence seems to indicate that a reasonable overriding royalty would not exceed 10 cents per ton and that the royalty Paragon could have expected to pay, dealing at arm's length under the circumstances [fol. 1300] here present, would have been 25 cents per ton. Consequently, we conclude that 25 cents per ton of the amounts paid to Clyborne by Paragon represented royalties deductible by Paragon as ordinary and necessary

business expenses under section 162(a)(3), and that the remaining 5 cents per ton paid by Paragon to Clyborne represented a nondeductible distribution of corporate earnings and profits and a dividend to Clyborne.

We realize that the overriding royalty allowed Clyborne as a result of the above conclusion would not be the same in all cases. However, the basic question is what amount Paragon would have been required to pay as royalty dealing with a stranger at arm's length and we have considered the reasonableness of the overriding royalty received by Clyborne only as one of the factors in deciding the basic question. Consequently, we have determined that the amount of royalty deductible by Paragon under all of the leases was 25 cents per ton, and that the amount taxable to Clyborne as royalties received is the difference between 25 cents per ton and the amounts required to be paid to the landowners and others as royalties and overriding royalties. The remaining 5 cents per ton paid by Paragon under all the leases is not deductible by Paragon and is taxable to Clyborne as a dividend.

[fol. 1301]

## 2. *Depletion Issue.*

### *Findings of Fact.*

Paragon acquired by assignment written leases on the coal in and underlying the land here involved in Buchanan County, Virginia, which leases required the lessee to mine either all or 85 percent of the minable coal in and underlying the tracts under lease. Paragon assumed all the obligations of the lessees under the leases, and was obligated to pay annual minimum royalties, tonnage royalties, and land taxes. After acquiring the leases, Paragon made substantial investments necessary for mining, processing, and marketing the coal underlying the leased boundaries, including construction and maintenance of a tippie, processing equipment, a powerline, a railroad sidetrack with four spurs running under the tippie, and a road from the tippie around the mountain close to the outcrop line of the coal over which coal could be trucked from the mines to the tippie. Paragon chose not to mine the coal itself but con-

tracted the mining out to various individuals and firms who were to mine the coal at their own expense and deliver the coal to Paragon's tipples. Paragon would then clean and size the coal and sell it on the market.

Petitioners Lee, Wesley, and Watson formed a partnership called Standard Smokeless Coal Company in 1953, and entered into an oral agreement with Paragon to mine the coal from a certain area of the Paragon lease. Standard mined coal from the Paragon property under this agreement during each of the calendar years 1954, 1955, and 1956. The above petitioners were partners in Standard in each of those years and petitioner Jack became a partner during the year 1956.

Petitioners Wesley, Bowling, and Watson formed another [fol. 1302] partnership in 1954 or 1955 known as Kyva Mining Company and entered into an oral agreement with Paragon to mine coal from another location or area included in the Paragon lease. In 1956 Kyva bought the equipment and mining rights of Sampy Lester, who was operating a mine adjacent to the Kyva mine under oral agreement with Paragon, for \$3,500, all of which is allocated to depreciable assets on its books and claimed depreciation thereon. Kyva produced coal under these agreements during each of the calendar years 1955 and 1956, and the above-named petitioners continued to be partners therein except that Bowling was not a partner after 1955 and petitioner Jack became a partner in the year 1956.

• Petitioners Lee, Wesley, and Bowling formed another partnership in 1956 known as Farwest Coal Company and bought out the equipment and interests of Meadows Coal Company, which had been producing coal from still other areas or locations included in the Paragon leases under an oral agreement between Meadows and Paragon made in 1954. Farwest agreed to pay Meadows approximately \$21,000 for its equipment and mining rights and allocated the entire amount to equipment on its books which it depreciated for tax purposes. Farwest obtained the consent of Paragon before buying out Meadows. Farwest produced coal from the mine originally opened by Meadows during the year 1956. The above-named petitioners were the part-

ners therein during the year 1956 and petitioner Jack became a partner in 1957.

Coal was also mined under the Paragon leases at different locations by C. W. Stilwell and S. W. Stilwell, operating as partners under the trade name of Bare Ridge Coal Company, during Paragon's taxable years ending September 30, 1955, 1956, and 1957, under an oral agreement made in 1951 between Paragon and the Stilwells; by Sherman Meadows, operating as Meadows Coal Company, during Paragon's taxable years ending September 30, 1955 and 1956, under an oral agreement entered into between Paragon and Meadows in 1954, the rights in which were assigned by Meadows to Farwest in 1956 as mentioned above; and by Sally Mining Company, a partnership comprised of George Beall and Lloyd Conley, during Paragon's taxable years ending September 30, 1955, 1956, and 1957, under an oral agreement entered into between Paragon and the partners in 1955. The Stilwells, Meadows, and Beall and Conley are not petitioners herein but Paragon claimed depletion on the coal mined by them during its taxable years here involved as it did on the coal mined by Standard, Kyva, and Farwest as above mentioned.

Most of the oral agreements here involved were made between the contractors and Paragon's then superintendent, Grogan, who died before the trial of this case. Consequently, it is impossible to determine with any certainty the exact terms of the oral agreements. However, based on the evidence presented and the conduct of the parties, the oral contracts between Paragon and the original contractors appear to have been arrived at in the following manner and to include the following provisions.

As Paragon extended a road around the side of the mountain a prospective contractor would be taken to various proposed sites for mine openings. When the contractor had chosen a particular site the representative of Paragon would point out on an overall property map, or with his arms on the surface of the ground, the general area in which the contractor could mine. The contractor agreed to [fol. 1304] mine the coal in that area and to deliver it to Paragon at its tippie at his own expense. Paragon usually would face up the site for the mine portal but the con-



tractor was required to provide his own men, equipment, chutes, and bins, and to extend a road from the road built by Paragon to the mine portal if necessary. All expenses of opening and operating the mine were borne by the contractor. The contractor did not assume any of Paragon's obligations under its leases and paid no royalties or taxes on the property or the mineral interest.

Paragon agreed to pay the contractor a fixed price per ton for coal delivered to its tipple, less  $2\frac{1}{2}$  percent for rejects. It was understood that the price might vary from time to time. The price paid by Paragon to the various contractors did vary up and down from time to time, depending somewhat on the general trend of market prices for the coal over extended periods and to some extent on labor costs. However, price changes made by Paragon to the contractors were always prospective and the contractors were notified several days in advance of any price change so that they always knew the price they would get for coal when they delivered it to the tipple. The contractor had no further control over the coal after it was delivered to Paragon's tipple and did not know how or for what price Paragon sold or otherwise disposed of the coal.

The contractor agreed either to provide his own power with his own compressors or to buy power from Paragon at a fixed rate per ton; in the latter event the contractor was required to convert the current from a.c. to d.c. at his own expense. The contractor also agreed to pay a certain amount per ton for engineering services inside the mine [fol. 1305] rendered by an engineer provided by Paragon. Paragon was to pay for all engineering services outside the mine.

After the agreement was made the engineer employed by Paragon provided the contractor with a mine map for his mine with projections thereon at approximately 60-foot intervals showing the general direction in which the mine should progress. Inasmuch as the various mines opened up around the side of the mountain all headed generally toward the center of the mountain, the engineer would indicate on the mine maps where barriers between adjacent mines should be left so that one contractor did not break through into the mine of the adjacent contractor. The



engineer also set spads for the contractor to indicate the general direction in which he was to mine. The engineer extended the projections from time to time and also provided the contractors with mine maps showing the areas mined, the remaining pillars, etc., at about 6-month intervals. Paragon insisted on all contractors using the same engineer, who could project a system for mining all the coal under its leases without leaving unrecovered pockets of coal and to prevent one contractor from breaking into the mine of another contractor. The contractors were required to obtain Paragon's permission before pulling pillars as they retreated from an area which had been mined. The contractors usually tried to develop their mines to produce a specified tonnage of coal per day, without which they did not think they could operate at a profit. It often took some time to develop a mine to this production stage.

At the time the oral contracts were entered into nothing was said about who was entitled to depletion, although [fol. 1306] Paragon expected to claim depletion and fixed the price it would pay the contractors with that in mind.

The contracts were not made for any specific period of time and nothing was said about the right to terminate by either party at the time the agreements were entered into. Numerous contractors ceased mining from time to time as they found they were unable to mine coal profitably or for other reasons of their own. Contractors who ceased mining were not permitted to remove buildings from the premises but usually took their equipment with them unless they had borrowed money from Paragon with the equipment as security. It was anticipated by both parties that a contractor would continue mining in the location assigned to him as long as the coal could be mined and sold at a profit and as long as the contractor employed proper mining methods and produced coal meeting Paragon's specifications. The contractors were not obligated to mine any specific amount of coal and were not specifically given the right to mine any particular area to exhaustion. The projections of the mines were based somewhat on the speed with which the contractor produced the coal in his area. If, with proper mining methods, he reached a point where he might inter-

sect another mine as projected, the first contractor to reach the point of intersection might be given the right to pierce the indicated barrier between the two mines and mine on forward. Also, if an adjacent mine ceased operating, the contractor was often permitted to pierce the indicated barrier between the two mines and recover the coal which would normally have been reached through the discontinued mine.

During the years here involved, Paragon took all mer-[fol. 1307] chantable coal produced by the various contractors operating on Paragon's leased property and paid the contractors the price fixed by Paragon. Paragon sold very little of its coal under contract and the prices it obtained for coal varied quite frequently. If Paragon was unable to take all of the contractors' coal either because of lack of coal cars or because its tipple was full, the contractor would fill his own bins and then shut down until Paragon could take more of his coal.

The contractors completed their obligations under the contracts by delivering the coal to Paragon's tipple and thereupon became entitled to their compensation for mining the coal by virtue of Paragon's personal covenant to pay them so much per ton. The contractors were not concerned with the sales price Paragon received for the coal.

The contractors paid nothing for the privilege of mining coal other than their investment in equipment, roads, and buildings, and their cost in opening the mine and mining the coal. They acquired no legal title either to the coal in place or to the coal after it was mined. The coal as delivered to Paragon's tipple by the contractors was not in a state which was salable to the consumer but had to be washed, graded, and treated in order to be salable upon the consumer market. All such processing was done by Paragon at its processing plant. The contractors sold none of the coal to anyone other than Paragon and were not entitled to do so.

During its taxable years ending September 30, 1955, 1956, and 1957, Paragon paid the following amounts to the following partnerships for coal produced under the above oral agreements:

[fol. 1308]

	1955	September 30, 1956	1957
Standard	\$151,368.53	\$146,877.01	\$134,535.80
Kyva	57,542.58	160,247.83	190,509.24
Farwest	—	—	165,560.70
Bare Ridge	298,297.63	258,435.03	269,532.59
Sally	10,162.17	66,907.54	71,117.70
Meadows	301,635.27	183,738.74	18,496.06
Total	819,006.18	816,206.15	849,752.09

Paragon claimed percentage depletion on the above amounts on its income tax returns for the above years.

Standard and Kyva received the following gross receipts from their operations under the Paragon leases, and claimed percentage depletion on those amounts on the partnership returns for the calendar years following:

	1954	1955	1956
Standard	\$103,850.66	\$154,457.69	\$145,741.26
Kyva	—	78,623.18	191,374.59 <sup>15</sup>

Respondent disallowed the above deductions for depletion claimed by both Paragon and the contract miners but agreed at the trial that either Paragon or the contract miners are entitled to the depletion deduction, but not both.

[fol. 1309]

## Opinion.

Section 611 provides that in the case of mines there shall be allowed as a deduction in computing taxable income a reasonable allowance for depletion to be made under regulations prescribed by the Secretary or his delegate. In the case of a lease the deduction under this section shall be apportioned between the lessor and lessee. Sec-

<sup>15</sup> According to stipulation of the parties. However, a lesser amount was shown on the return for Kyva for the year 1956 and percentage depletion computed accordingly. Kyva did receive gross receipts in 1956 in the amount shown above.

tion 613 provides that the allowance for percentage depletion of coal shall be 10 percent of the gross income from the property, excluding an amount equal to rents or royalties paid, such allowance not to exceed 50 percent of the taxpayer's taxable income from the property. The gross income from the property is defined as gross income from mining.

There have been numerous cases involving the question of who is entitled to percentage depletion with respect to the production of minerals. In *Palmer v. Bender*, 287 U.S. 551 (1933), the Supreme Court held that the language of the statute is broad enough to provide a deduction for any taxpayer who "has acquired, by investment, any interest in the oil in place, and secures, by any form of legal relationship, income derived from the extraction of the oil, to which he must look for a return of his capital." The Court further said that the deduction is not "dependent upon the particular legal form of the taxpayer's interest in the property to be depleted \* \* \* It is enough if \* \* \* he has retained a right to share in the oil produced. If so, he has an economic interest in the oil, in place, which is depleted by production." This concept of an economic interest in the mineral in place has been adopted by the courts and the regulations as the factor determining whether a taxpayer is entitled to depletion, [fol. 1310] but the question of what gives a taxpayer an economic interest in the mineral in place has posed many problems. For instance, in *Helvering v. Bankline Oil Co.*, 303 U.S. 362 (1938), the Supreme Court said that the "phrase 'economic interest' is not to be taken as embracing a mere economic advantage derived from production, through a contractual relation to the owner, by one who has no capital investment in the mineral deposit."

Where a lessee enters into an agreement with the owner of the mineral interest, coal in this case, giving the lessee the right to mine and remove all the coal in a seam or seams underlying a specified tract of land and obligating the lessee to mine and remove (or pay for) all or a specified percentage of the minable and merchantable coal in the seam or seams and to pay to the owner a royalty

of so much per ton for each ton of coal mined or minable, usually with a minimum annual royalty, and under which agreement the lessee has the right to sell the coal for whatever price he can obtain and retain the proceeds, there would seem to be no question that the lessee has acquired an economic interest in the coal in place, which is depleted by production and which, under the statutory scheme, entitles the lessee to the percentage depletion deduction, based on his gross income from mining, less rents and royalties paid.

Paragon meets the above requirements and, not having assigned or sublet its leases, it is entitled to the depletion deduction based on its entire gross income from the property, less rents and royalties paid, unless it has, by its agreements with the mining contractors, surrendered all or a part of its capital interest in the coal in place, or the contractors have in some manner acquired an economic [fol. 1311] interest in the coal in place which would entitle them to the depletion deduction on that part of the gross income from the property equal to the amount they receive for mining the coal. It is clear that if the contractors are entitled to a depletion deduction on the amounts earned under their contracts, the amount allowable to Paragon for depletion of its economic interest in the coal would be correspondingly reduced. *Parsons v. Smith*, 359 U.S. 215 (1959). The contractors here have not acquired any interest in the coal by purchase or lease from the landowners or their lessees, and consequently their right to the depletion deduction rests entirely on the interests they acquired under their contracts with Paragon. It is this situation, where the owner or lessee of coal in place chooses not to mine it himself but enters into a contract with an independent contractor to mine the coal for him, that has given rise to most of the controversies in recent years over which party is entitled to the depletion deduction. Respondent correctly agrees that one of the two parties is entitled to depletion on the amount paid the contractor, but not both.

We believe much of the uncertainty in this area was removed by the Supreme Court's decision in *Parsons v.*



*Smith, supra.* In that case, after reviewing the history of the depletion deduction, the Court said, "In short, the purpose of the depletion deduction is to permit the owner of a capital interest in mineral in place to make a tax-free recovery of that depleting capital asset." In the two cases there involved the facts were quite similar to those here involved except that in one case, which involved an oral agreement, it was agreed that if either party wanted to quit, all that was necessary to terminate the arrangement [fol. 1312] was the giving of a 10-day notice, and in the second case, which involved a written contract, it was expressly provided that the owner of the coal lands could terminate the agreement at any time upon 30 days' written notice, without specifying any reason therefor. The contractors there argued that their contractual right to mine coal from the designated lands and the use of their equipment, organizations, and skills in doing so should be regarded as the making of a capital investment in, and the acquisition of an economic interest in, the coal in place. The Court, referring to the assertion as a legal fiction, refused to indulge in the fiction because it found the fiction was negated by the facts. The opinion set forth the facts which the Court found to be opposed to the asserted fiction, being (1) that the contractors' investment was in equipment, not in coal in place; (2) their investment was recoverable through depreciation of the equipment; (3) the contracts were terminable on short notice; (4) the landowners did not agree to, nor did they, actually surrender any capital interest in the coal in place; (5) the coal at all times belonged to the landowners and the contractors could not sell or keep any of it, but were required to deliver all coal to the landowners; (6) the contractors were to be paid a fixed sum for each ton mined and delivered and were not to have any part of the proceeds of the sale of the coal; (7) the contractors had to look only to the landowners for all sums to come due them under their contracts.

As mentioned above, we find that the obligations and rights of the parties here involved are similar in most respects to those involved in the *Parsons* case except there



was no specific right to terminate mentioned in the agree-[fol. 1313] ment between the parties.<sup>16</sup> While such right on the part of the landowner to terminate an agreement on short notice and without cause may go far toward limiting the contractor's right to the depletion deduction, we do not think the absence of a specific right to terminate necessarily gives the contractor an economic interest in the coal in place. We do not think that a contractor's investment in depreciable equipment and other property required to mine and remove coal, and the necessary expense he incurs in opening and operating a mine, gives him a depletable economic interest in the coal in place, where the contract, under which he is authorized to mine the coal and upon which his right to the depletion deduction rests entirely, simply authorizes him to mine the coal in a general area for an indefinite period with no obligation on his part to pay anything for the coal, or to continue mining until the supply of coal is exhausted, and does not permit him to sell the coal on the open market after it is mined. In our opinion such a contractor, by his investment, may obtain an economic advantage derived from production but does not acquire an economic interest in the coal in place.

Here the contractors paid nothing for the coal while Paragon was obligated under its leases to pay a minimum annual royalty and a tonnage royalty on all coal mined, was required to pay taxes on the land and the mineral in place, and was required to remove, or pay a royalty for, [fol. 1314] at least 85 percent of the minable and merchantable coal. While there is some implication in the testimony that the contractors might have been entitled to sell the coal they produced elsewhere had Paragon not taken it all, this is refuted by the positive testimony of the representatives of Paragon that all coal had to be delivered

<sup>16</sup> The testimony on this point is conflicting but we have concluded from all the evidence that the right to terminate was not specifically mentioned when these oral agreements were entered into. There is evidence that Paragon's superintendent had no authority to negotiate agreements that were not terminable at the will of the parties.

to Paragon, supported by the fact that all coal was delivered to Paragon, and the absence of any explanation why Paragon, which was obligated to pay a royalty on the coal, would permit the contractors, who had paid nothing for the coal and who had no legal title to the coal, to sell it elsewhere. These facts and others indicate that Paragon did not intend to nor did it actually surrender any capital interest in the coal in place to the contractors. In fact, most of the contractor-petitioners in this case disclaim any capital investment in the coal in place—the unmined coal. As said by the Supreme Court in *Parsons v. Smith, supra*:

Surely these facts show that petitioners did not actually make any capital investment in, or acquire any economic interest in, the coal in place, and that they may not fictionally be regarded as having done so.

The facts in *Parsons v. Smith, supra*, indicate that petitioners' investments there were similar to the investments of the contractors here.

Furthermore, the contractors had no interest in the coal legally or otherwise after they had delivered it to Paragon. They were paid a fixed price per ton for coal delivered and had no knowledge or interest in the price that Paragon received from the sale of the coal to the consumer. While there is some evidence that the amount paid by Paragon fluctuated somewhat with extended changes in the market price of coal and changes in labor costs, there is no evidence that the amount paid by Paragon was directly [fol. 1315] related either to the price it was getting for the coal or to the sales price of a particular contractor's coal, and the amount was apparently changeable at the will of Paragon. It is also undisputed that the contractor knew the fixed sum he would receive before he delivered the coal. In other words, the contractor had to rely on the personal covenant of Paragon for payment for his services rendered in producing the coal.

It is not clear from the evidence whether the contractors were given any specific boundary of coal to mine. The evi-

dence rather indicates that the contractors were given a general area in which to mine under the supervision of an engineer who was authorized to plan a system of mining for the extraction of all the minable coal in the seam and who was authorized to change the projection of any contractor's mine in order to accomplish this objective. The contractors testified that the area they were given the right to mine was indicated to them by Paragon's superintendent either pointing out a general area on the surface of the ground or placing his hand on a property map which showed only the outcrop line of the coal with no division of the coal underground. Later the engineer provided mine maps with barriers shown thereon, but we believe the barriers were shown primarily to prevent adjacent contractors from breaking through into each other's mines and to equalize the rights of the miners according to their capabilities under a planned system of mining, and were not intended to specify definite boundaries for the areas of coal the contractor was entitled to mine. As pointed out by Paragon's present superintendent, Paragon did not know at the time the agreements were made what equipment and skills a particular contractor would use or how [fol. 1316] long he would stay, and because of the numerous rolls or faults characteristic of this seam of coal, it could not be determined in advance from just what direction the coal in an area would have to be mined to recover all minable and merchantable coal. But inasmuch as Paragon was obligated under its leases to remove at least 85 percent of the coal, the areas given to a particular contractor had to be and remain flexible.

The evidence is conflicting as to whether the contractors were given the right to mine a specific area of coal to exhaustion. However, there is very little conflict in the evidence that the contractors were not *obligated* to mine any boundary of coal to exhaustion and, in fact, many of them quit at any time they chose. It seems unlikely that the parties would have contemplated granting the contractor the nonterminable right to mine specific areas to exhaustion without also obligating him to so mine it. Furthermore, Paragon could not give an absolute nonter-

minable right to mine to exhaustion in view of the landowner's reserved rights under the Paragon lease to terminate in the event of noncompliance with the terms of the lease. While we cannot find that the right to terminate was specifically mentioned when the agreements were made, neither can we conclude that the agreements were nonterminable.

On the facts in this case we conclude that the contractors could look only to the difference in their cost of mining the coal and the amount Paragon paid them for a return of their investment, that they made no investment in and acquired no economic interest in the coal in place, and that consequently they are not entitled to depletion on the coal they produced. As a result we conclude that Paragon did [fol. 1317] have an economic interest in the coal in place and is entitled to deduct depletion from the gross income it received therefrom without reduction for the amount it paid the contractors.

We recognize that the Court of Appeals for the Fourth Circuit held in *Stilwell v. United States*, 250 F. 2d 736 (1957), that one of the contractors producing coal on the property here involved, under an oral agreement presumably similar to the agreements made with the contractors herein, was entitled to depletion on the coal he produced under the agreement for the year 1952. The Court of Appeals, in reversing the District Court, found that the contractor's expenditures for equipment, a tippie at the mine entry, powder house and powerplant, and tracks inside the mine, while not of themselves amounting to an investment in the coal in place, did indicate that the parties did not intend the contract to be terminable so long as the contractor's operations were satisfactory and the coal could be profitably marketed. However, we must decide this case on the evidence presented here, and we cannot conclude from that evidence that the contractors had a nonterminable right to mine the coal in any specific area to exhaustion. Without such right we do not believe that under the doctrine of *Parsons v. Smith*, *supra*, decided after *Stilwell*, the investment of these contractors in depreciable equipment and other property required to mine,

remove, and deliver the coal gave them an economic interest in the coal in place which would entitle them to the depletion deduction. See *United States v. Stallard*, 273 F. 2d 847 (C.A. 4, 1959); *Utah Alloy Ores, Inc.*, 33 T.C. 917 (1960); *Walter Bernard McCall*, 37 T.C. 674 (1962), on appeal (C.A. 4); *J. Shelton Bolling*, 37 T.C. 754 (1962); [fol. 1318] *William M. Legg*, 39 T.C. — (Oct. 8, 1962), all decided subsequent to *Parsons v. Smith*, *supra*. Cf. *Denise Coal Company v. Commissioner*, 271 F. 2d 930 (C.A. 3, 1959), reversing an opinion of this Court on the issue here material, 29 T.C. 528 (1957), entered prior to the decision of the Supreme Court in *Parsons v. Smith*, *supra*.

Decision will be entered for the respondent in Docket No. 84124.

Decisions will be entered under Rule 50 in Docket Nos. 84122, 84123, 84125, 84126, 90765, and 90766.

[fol. 1319]

BEFORE THE TAX COURT OF THE UNITED STATES  
Docket No. 84122

ROBERT LEE MERRITT and WINNIE MERRITT, Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

DECISION—Entered June 27, 1963

Pursuant to the opinion of the Court filed October 31, 1962, and the agreed computation of the tax liabilities filed by the parties, it is

Ordered and Decided: That there are deficiencies in income taxes due from the petitioners for the taxable years 1954, 1955, and 1956 in the respective amounts of \$848.48, \$1,532.21, and \$3,373.52; and



That there is a deficiency in addition to the tax under the provisions of section 294(d)(1)(A) of the Internal Revenue Code of 1939 due from the petitioners for the taxable year 1954 in the amount of \$208.50.

W. M. Drennen, Judge.

\*\*\*\*\*

It is hereby stipulated that the foregoing decision is in accordance with the opinion of the Court and the agreed computation of the parties, and that the Court may enter this decision without prejudice to the right of petitioners to contest the correctness of the decision entered herein, pursuant to the statute in such cases made and provided.

John Y. Merrell, Counsel for Petitioners.

Crane C. Hauser, Chief Counsel, Internal Revenue Service.

(Seal)

[fol. 1320]

BEFORE THE TAX COURT OF THE UNITED STATES  
Docket No. 84123

G. WESLEY MERRITT and FANNIE J. MERRITT, Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

DECISION—Entered June 27, 1963

Pursuant to the determination of the Court, as set forth in its Findings of Fact and Opinion filed October 31, 1962, respondent filed on May 9, 1963, a computation for entry of decision. On June 26, 1963, at Motions Calendar counsel for petitioners stated he had no objection to respondent's computation. Accordingly, it is:



Ordered and Decided: That there are deficiencies in income taxes due from petitioners for the taxable years 1954 and 1955 in the amounts of \$886.88 and \$1,596.32, respectively;

That there is a deficiency in income tax due from petitioners for the taxable year 1956 in the amount of \$3,317.39, of which amount \$2,842.78 remains unassessed and unpaid; and

That there is an addition to tax under the provisions of section 294(d) of the Internal Revenue Code of 1939 due from petitioners for the taxable year 1954 in the amount of \$231.58.

W. M. Drennen, Judge.

(Seal)

[fol. 1321]

BEFORE THE TAX COURT OF THE UNITED STATES

WASHINGTON

Docket No. 84124

JACK D. MERRITT and WILLA GRAY MERRITT, Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

DECISION—Entered June 27, 1963

Pursuant to the determination of the Court, as set forth in its Findings of Fact and Opinion, filed October 31, 1962, it is

Ordered and Decided: That there is a deficiency in income tax for the year 1956 in the amount of \$3,331.81.

W. M. Drennen, Judge.

(Seal)

[fol. 1322]

BEFORE THE TAX COURT OF THE UNITED STATES  
WASHINGTON

Docket No. 84125

VIRGIL BOWLING and GLADYS BOWLING, Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

DECISION—Entered June 27, 1963

Pursuant to the determination of the Court, as set forth in its Findings of Fact and Opinion filed October 31, 1962, respondent filed on May 9, 1963, a computation for entry of decision. On June 26, 1963, at Motions Calendar counsel for petitioners stated he had no objection to respondent's computation. Accordingly, it is:

Ordered and Decided: That there are deficiencies in income taxes due from petitioners for the taxable years 1955 and 1956 in the amounts of \$90.18 and \$3,342.48, respectively.

W. M. Drennen, Judge.

(Seal)

[fol. 1323]

BEFORE THE TAX COURT OF THE UNITED STATES  
WASHINGTON

Docket No. 84126

JAMES O. WATSON, 3RD and LUCY J. WATSON, Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

DECISION—Entered June 27, 1963

Pursuant to the determination of the Court, as set forth in its Findings of Fact and Opinion filed October 31, 1962,

respondent filed on May 9, 1963, a computation for entry of decision. On June 26, 1963, at Motions Calendar counsel for petitioners stated he had no objection to respondent's computation. Accordingly, it is:

Ordered and Decided: That there are deficiencies in income taxes due from petitioners for the taxable years 1954 and 1955 in the amounts of \$876.84 and \$837.47, respectively.

W. M. Drennen, Judge.

(Seal)

[fol. 1324]

BEFORE THE TAX COURT OF THE UNITED STATES

Docket No. 90766

PARAGON JEWEL COAL COMPANY, INCORPORATED, Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

DECISION—Entered June 27, 1963

Pursuant to the opinion of the Court filed October 31, 1962, and the agreed computation of the tax liabilities filed by the parties; and incorporating herein the facts recited in the computation as the findings of the Court, it is

Ordered and Decided: That there is an overpayment in income tax for the taxable year ended September 30, 1955, in the amount of \$32.20, which amount was paid on March 14, 1956, and for which amount a claim for refund was filed on July 31, 1956, which was within the period provided by section 6511(b)(2) of the Internal Revenue Code of 1954; and

That there are deficiencies in income taxes due from the petitioner for the taxable years ended September 30, 1956, and September 30, 1957, in the amounts of \$6,338.04 and \$7,084.45, respectively.

W. M. Drennen, Judge.

W. M. Drennen, Judge.

It is hereby stipulated that the foregoing decision is in accordance with the opinion of the Court and the agreed computation of the parties, and that the Court may enter this decision, without prejudice to the right of either party to contest the correctness of the decision entered herein, pursuant to the statute in such cases made and provided.

Leroy Katz, Counsel for Petitioner.

Crane C. Hauser, Chief Counsel, Internal Revenue Service.

(Seal)

[fol. 1325]

BEFORE THE TAX COURT OF THE UNITED STATES

PETITIONERS' EXHIBIT No. 74

AMOUNT PER TON PAID BY PARAGON JEWEL TO  
BARE RIDGE COAL COMPANY FROM NOVEMBER  
15, 1951 TO SEPTEMBER 30, 1957

November 15, 1951 through February 9, 1952	\$ 4.00
February 11, 1952 through September 30, 1952	4.50
October 1, 1952 through February 28, 1953	4.75
March 1, 1953 through January 4, 1954	4.50
January 5, 1954 through March 30, 1954	4.25
April 1, 1954 through August 31, 1955	4.00
September 1, 1955 through March 30, 1956	4.25
April 1, 1956 through September 30, 1956	4.50
October 1, 1956 through September 30, 1957	4.75

[fol. 1326]

BEFORE THE TAX COURT OF THE UNITED STATES

PETITIONERS' EXHIBIT No. 86

[fol. 1327]

BRIEF

IN RE:

KYVA MINING COMPANY

GRUNDY, VIRGINIA

YEARS: 1955 AND 1956

[fol. 1328]

Grundy, Virginia  
May 16, 1958District Director of Internal Revenue,  
Audit Division,  
Richmond, Virginia.

Dear Sir:

Reference is made to Revenue Agent's report dated November 6, 1957, enclosed with your letter of transmittal dated December 20, 1957, addressed to

**KYVA MINING COMPANY (A Partnership)**  
**GRUNDY, VIRGINIA**

wherein it is proposed to increase taxable income for the calendar years 1955 and 1956 in the following amounts:

YEAR	AMOUNT
1955	\$ 1,670.30
1956	21,645.31

The proposed adjustments are represented by the following:

DESCRIPTION	YEAR 1955	YEAR 1956
Percentage Depletion disallowance	\$1,684.99	\$18,915.84
Depreciation disallowance	402.18	513.29
Long-Term Capital Gain increase	334.62	
Income from Coal Sales overstated	751.49	
Income from Coal Sales understated		2,216.18
<b>TOTAL PROPOSED ADJUSTMENTS</b>	<b>\$1,670.30</b>	<b>\$21,645.31</b>

[fol. 1329] The proposed adjustments are allocated to the respective partners in the following manner:

PARTNER	YEAR 1955	YEAR 1956
Virgil Bowling, Grundy, Virginia:		
Ordinary Income	\$ 445.23	\$10,822.66
Long-Term Capital Gain	111.54	
G. Wesley Merritt, Louisa, Kentucky:		
Ordinary Income	445.23	5,411.32
Long-Term Capital Gain	111.54	
Jack D. Merritt, Grundy, Virginia:		
Ordinary Income		5,411.33
J. O. Watson, Louisa, Kentucky:		
Ordinary Income	445.22	
Long-Term Capital Gain	111.54	
<b>TOTAL ALLOCATION OF PROPOSED ADJUSTMENTS</b>	<b>\$1,670.30</b>	<b>\$21,645.31</b>

Italic figures appear in red on original copy.



## STATEMENT OF FACTS

The above named partners who, with their respective wives, filed timely joint income tax returns for the years 1955 and 1956, have been engaged for many years in the mining of coal and related businesses in Virginia and Kentucky and, during the years in controversy, operated the partnership of Kyva Mining Company in Buchanan County, Virginia, under an oral contract with Paragon Jewel Coal Company.

Paragon Jewel Coal Company (hereinafter referred to as "Paragon") leased from the owners all of the coal land involved in this case and obligated itself to pay an annual minimum royalty, tonnage royalty, wheelage, land taxes and extraction taxes. It made substantial improvements necessary for transporting, processing and marketing the coal, including roads, railroad side-trackage and a tipple with processing equipment. Paragon elected not to mine [fol. 1330] the coal underlying its leased boundaries, but entered into oral contracts with several mine operators to conduct the mining operations at their own risk and expense.

During the latter part of the year 1954 a contract was discussed with Paragon's superintendent. After inspecting the property, one or more of the present partners entered into an oral contract to produce coal from a designated area, and, as a result, formed the present partnership of Kyva Mining Company to conduct the operation.

The provisions of the contract were not explicitly stated, but must be determined from the course of conduct of the parties as well as from the fragmentary evidence of their conversations.

The partnership was obliged to extract all mineable coal in the area allocated to it and to deliver the coal at its expense to Paragon's tipple.

The partnership could not sell the coal to anyone else without the permission of Paragon.

Paragon agreed to receive and to pay the partnership a specified price per ton for all coal so mined and delivered.

It was understood, however, that this price might be modified from time to time in accordance with the existing market price of coal.

The contract was for no specific term.

The partnership assumed the full responsibility and expense of operating the mine, in accordance with state and federal mining laws, including all engineering services required.

Paragon was to build and maintain a road from its tippie to a point approximating the partnership's mine head. [fol. 1331] It was agreed that at the conclusion of the operation the partnership might remove its mining equipment, but not any structures or items necessary for the safety of the mine.

At the time the contract was made depletion was not discussed.

Pursuant to the contract, the partnership expended considerable sums in structures and equipment incident to the operation of its mine.

The partnership continued its mining operation under the contract with Paragon without interruption until its affairs were merged into that of Farwest Coal Company, another operating partnership, during the latter part of the year 1957.

The question of the right to terminate the contract never arose between the partnership and Paragon.

### ISSUES INVOLVED

The proposed adjustments to taxable income for the years 1955 and 1956 are herein protested in part on the grounds that:

(a) The Revenue Agent erred in disallowing the percentage depletion deduction for the years 1955 and 1956.

Other issues raised by the Revenue Agent for the years 1955 and 1956 are of little consequence, and are herein conceded.

## ARGUMENT

The partnership is entitled to a deduction of percentage depletion under Sections 611 (a) and 613 (b) (4) of the Internal Revenue Code of 1954 if it possessed an economic interest in the coal that it mined, as that term has been [fol. 1332] defined and interpreted by the Courts.

It is well established that the purpose of the depletion allowance is to encourage the exploration of natural resources which are exhausted upon recovery. The allowance is afforded to all who have an economic interest in the mineral.

The partnership's contract with Paragon embraced the following understanding between the partners and Paragon:

(a) The contract covered a specific area of land and gave the exclusive right to mine all of the merchantable coal from within the designated area.

(b) The contract required the partnership to conduct its mining operations in a safe manner and in accordance with the State and Federal laws and regulations applicable to coal mining.

(c) The contract required that the partnership be directly responsible to the State and Federal mining authorities in the conduct of its mining operations.

(d) The contract required that Paragon furnish the engineering services, and that the partnership pay for such services.

(e) The contract required that the partnership was to mine the coal in accordance with the maps and directions of the Paragon engineers.

(f) The contract required that the partnership was to be solely responsible for its mining operation, for the production of the coal and for the delivery of the coal to Paragon's tippie.

(g) The contract required the partnership to provide all of the equipment, labor, power, materials and supplies incident to its mining operation.

[fol. 1333] (h) The contract specified a per ton price for all coal delivered to Paragon's tippie, and this price was to fluctuate in accordance with the market price of coal.

(i) The contract specified the right of termination by either party at any time, but the question never arose between the partnership and Paragon.

As of December 31, 1955 and December 31, 1956, the cost of mining equipment used in the partnership's business was as follows:

December 31, 1955	\$25,576.34
December 31, 1956	36,901.30

The expenses, inclusive of depreciation but exclusive of percentage depletion, of the partnership's business for the years 1955 and 1956 were as follows:

Year 1955	\$ 76,036.64
Year 1956	145,759.58

The economic realities of the situation involved here are that the partners had the responsibility for, and the right to produce, coal from the mineral property in question. They made a very substantial investment in money and time for the production of coal. The recovery of this investment and their rights in the production of coal depended completely upon the extraction, delivery and sale of the mineral.

This case is identical with that of the Stilwell Case (*C. W. and Mattie Stilwell and S. W. and Rosie Stilwell v. United States of America*), in which the District Court for the Western District of Virginia held for the Government. The United States Court of Appeals for the Fourth Circuit reversed and remanded the case in its decision of December 27, 1957.

[fol. 1334] The Stilwell mine is located adjacent to or near that of the partnership's mine, and is operated under an oral contract from Paragon setting out the identical terms and conditions as that specified in the instant case. If the Stilwell operation is to be allowed percentage depletion (and the Fourth Circuit has so ruled) and the partnership operation denied percentage depletion, we will have the ironic situation of two similar operations in the same area and operating under identical terms and conditions receiving different tax treatment. One contractor of Paragon, as in the Stilwell case, will be allowed depletion, but another contractor of Paragon will be denied depletion, even though his operation is the same, his responsibilities are the same, and his compensation is the same.

### GENERAL

It is respectfully requested that this case be transferred to the Appellate Division of the District Commissioner's Office, and that an oral hearing be arranged at a time mutually convenient to that office and the taxpayer's representatives.

Power of attorney, in the name of the writer of this brief, is on file in your office.

Respectfully submitted,

KYVA MINING COMPANY

By: /s/ G. WESLEY MERRITT

Partner

[fol. 1335]

STATE OF VIRGINIA )

) ss.

TOWN OF GRUNDY )

Personally appeared before me, a Notary Public for the state and town aforesaid, G. Wesley Merritt, who, upon being duly sworn; stated that he is one of the partners mentioned in the foregoing brief; that he has read the brief in

its entirety; and that, to the best of his knowledge and belief, the statements made therein are true.

Given under my hand, this the 19th day of May, 1958.

/s/ JEAN B. DENNIS  
Notary Public

My commission expires Feb. 25 1961.

(Seal)

### ENROLLED AGENT'S CERTIFICATE

I, C. J. Stull, an enrolled agent, have prepared the foregoing brief and, based upon my examination of the accounts and the information furnished to me, the statements made therein are known or believed to be true.

/s/ C. J. STULL C.P.A. (Va.)  
Enrolled Agent



[fol. 1336]

BEFORE THE TAX COURT OF THE UNITED STATES

PETITIONERS' EXHIBIT No. 87

[fol. 1337]

BRIEF

IN RE:

STANDARD SMOKELESS COAL COMPANY

GRUNDY, VIRGINIA

YEARS: 1954, 1955 AND 1956

[fol. 1338]

Grundy, Virginia  
May 16, 1958District Director of Internal Revenue,  
Audit Division,  
Richmond, Virginia.

Dear Sir:

Reference is made to Revenue Agent's report dated November 4, 1957, enclosed with your letter of transmittal dated December 20, 1957, addressed to

STANDARD SMOKELESS COAL COMPANY  
(A Partnership)  
GRUNDY, VIRGINIA

wherein it is proposed to increase taxable income for the calendar years 1954, 1955 and 1956 in the following amounts:

YEAR	AMOUNT
1954	\$ 6,314.17
1955	16,444.58
1956	21,210.46

The proposed adjustments are represented by the following:

DESCRIPTION	YEAR 1954	YEAR 1955	YEAR 1956
Percentage Depletion disallowance	\$6,314.17	\$15,334.78	\$13,836.76
Income from Coal Sales understated		1,109.80	662.03
Deferred Income disallowed			6,711.67
<b>TOTAL PROPOSED ADJUSTMENTS</b>	<u>\$6,314.17</u>	<u>\$16,444.58</u>	<u>\$21,210.46</u>

[fol. 1339] The proposed adjustments are allocated to the respective partners in the following manner:

PARTNER	YEAR 1954	YEAR 1955	YEAR 1956
Robert Lee Merritt, Grundy, Va: Ordinary Income	\$2,104.72	\$ 5,481.52	\$10,605.24
G. Wesley Merritt, Louisa, Ky: Ordinary Income	2,104.73	5,481.54	5,302.61
J. O. Watson, Louisa, Ky: Ordinary Income	2,104.72	5,481.52	
Jack D. Merritt, Grundy, Va: Ordinary Income			5,302.61
<b>TOTAL ALLOCATION</b>	<u>\$6,314.17</u>	<u>\$16,444.58</u>	<u>\$21,210.46</u>

#### STATEMENT OF THE FACTS

The above named partners who, with their respective wives, filed timely joint income tax returns for the years 1954, 1955 and 1956, have been engaged for many years

(with the exception of Jack D. Merritt, who came into the partnership in 1956) in the mining of coal and related businesses in Virginia and Kentucky and, during the years in controversy, operated the partnership of Standard Smokeless Coal Company in Buchanan County, Virginia, under an oral contract with Paragon Jewel Coal Company.

Paragon Jewel Coal Company (hereinafter referred to as "Paragon") leased from the owners all of the coal land involved in this case and obligated itself to pay an annual minimum royalty, tonnage royalty, wheelage, land taxes and extraction taxes. It made substantial improvements necessary for transporting, processing and marketing the coal, including roads, railroad side-trackage and a tippie with processing equipment. Paragon elected not to mine the coal underlying its leased boundaries, but entered into oral contracts with several mine operators to conduct the [fol. 1340] mining operations at their own risk and expense.

During the month of June in the year 1953, Robert Lee Merritt, one of the aforementioned partners, came to Virginia for the purpose of discussing a contract with Paragon's superintendent. After inspecting the property and satisfying himself with regard to the merits of the venture, he entered into an oral contract to produce coal from a designated area and, as a result, formed the present partnership of Standard Smokeless Coal Company to conduct the operation.

The provisions of the contract were not explicitly stated, but must be determined from the course of conduct of the parties as well as from the fragmentary evidence of their conversations.

The partnership was obliged to extract all mineable coal in the area allocated to it and to deliver the coal at its expense to Paragon's tippie.

The partnership could not sell the coal to anyone else without the permission of Paragon.

Paragon agreed to receive and to pay the partnership a specific price per ton for all coal so mined and delivered.

It was understood, however, that this price might be modified from time to time in accordance with the existing market price of coal.

The contract was for no specific term.

The partnership assumed full responsibility and expense of operating the mine, in accordance with State and Federal mining laws, including all engineering services required.

Paragon was to build and maintain a road from its tipple to a point approximating the partnership's mine head.

It was agreed that at the conclusion of the operation the [fol. 1341] partnership might remove its mining equipment, but not any structures or items necessary for the safety of the mine.

At the time the contract was made depletion was not discussed.

Pursuant to the contract, the partnership expended considerable sums in structures and equipment incident to the operation of its mine.

The partnership has continued its mining operation under its contract with Paragon without interruption.

The question of the right to terminate the contract has never arisen between the partnership and Paragon.

### ISSUES INVOLVED

The proposed adjustments to taxable income for the years 1954, 1955 and 1956 are herein protested in part on the grounds that:

- (a) The Revenue Agent erred in disallowing the percentage depletion deduction for the years 1954, 1955 and 1956.

Other issues raised by the Revenue Agent for the years 1955 and 1956 are herein conceded.

## ARGUMENT

The partnership is entitled to a deduction of percentage depletion under Sections 611 (a) and 613 (b) (4) of the Internal Revenue Code of 1954 if it possessed an economic interest in the coal that it mined, as that term has been defined and interpreted by the Courts.

It is well established that the purpose of the depletion allowance is to encourage the exploration of natural resources which are exhausted upon recovery. The allowance [fol. 1342] is afforded to all who have an economic interest in the mineral.

The partnership's contract with Paragon embraced the following understanding between the partners and Paragon.

(a) The contract covered a specific area of land and gave the exclusive right to mine all of the merchantable coal from within the designated area.

(b) The contract required the partnership to conduct its mining operations in a safe manner and in accordance with the State and Federal laws and regulations applicable to coal mining.

(c) The contract required that the partnership be directly responsible to the State and Federal mining authorities in the conduct of its mining operations.

(d) The contract required that Paragon furnish the engineering services, and that the partnership pay for such services.

(e) The contract required that the partnership was to mine the coal in accordance with the maps and directions of the Paragon engineers.

(f) The contract required that the partnership was to be solely responsible for its mining operation, for the production of the coal and for the delivery of the coal to Paragon's tipples.

(g) The contract required the partnership to provide all of the equipment, labor, power, materials and supplies incident to its mining operation.

(h) The contract specified a per ton price for all coal delivered to Paragon's tipple, and this price was to fluctuate in accordance with the market price of coal.

(i) The contract specified the right of termination by either party at any time, but the question has never arisen between the partners and Paragon.

[fol. 1343] As of December 31, 1954, December 31, 1955 and December 31, 1956, the cost of mining equipment used in the partnerships' business was as follows:

	STANDARD	KYVA
December 31, 1954	\$18,939.46	—
December 31, 1955	29,440.24	\$25,576.34
December 31, 1956	33,263.81	26,901.30

The expenses, inclusive of depreciation but exclusive of percentage depletion, of the partnerships' business for the years 1954, 1955 and 1956 were as follows:

YEAR	STANDARD	KYVA
1954	\$73,214.02	—
1955	117,313.42	\$76,036.64
1956	99,910.70	145,759.58

The economic realities of the situation involved here are that the partners had the responsibility for, and the right to produce, coal from the mineral property in question. They made a very substantial investment in money and time for the production of coal. The recovery of this investment and their rights in the production of coal depended completely upon the extraction, delivery and sale of the mineral.

This case is identical with that of the Stilwell Case (C. W. and Mattie Stilwell and S. W. and Rosie Stilwell v. United States of America), in which the District Court for the

*Italic figures are pencilled notations on original copy.*



Western District of Virginia held for the Government. The United States Court of Appeals for the Fourth Circuit reversed and remanded the case in its decision of December 27, 1957.

The Stilwell mine is located adjacent to that of the partnership's mine, and is operated under an oral contract from [fol. 1344] Paragon setting out the identical terms and conditions as that specified in the instant case.

If the Stilwell operation is to be allowed percentage depletion (and the Fourth Circuit has so ruled) and the partnership operation denied percentage depletion, we will have the ironic situation of two similar operations adjacent to one another and operating under identical terms and conditions receiving different tax treatment. One contractor of Paragon, as in the Stilwell case, will be allowed depletion, but another contractor of Paragon will be denied depletion, even though his operation is the same, his responsibilities are the same, and his compensation is the same.

### GENERAL

It is respectfully requested that this case be transferred to the Appellate Division of the District Commissioner's Office, and that an oral hearing be arranged at a time mutually convenient to that office and the taxpayer's representatives.

Power of attorney, in the name of the writer of this brief, is on file in your office.

Respectfully submitted,

STANDARD SMOKELESS COAL COMPANY  
By: /s/ G. WESLEY MERRITT, Partner

[fol. 1345]

STATE OF VIRGINIA )  
 ) ss.  
TOWN OF GRUNDY )

Personally appeared before me, a Notary Public for the state and town aforesaid, G. Wesley Merritt, who, upon being duly sworn, stated that he is one of the partners men-

tioned in the foregoing brief; that he has read the brief in its entirety; and that, to the best of his knowledge and belief, the statements made therein are true.

Given under my hand, this the 19th day of May, 1958.

/s/ JEAN B. DENNIS  
Notary Public

My commission expires Feb. 25, 1961.

(Seal)

### ENROLLED AGENT'S CERTIFICATE

I, C. J. Stull; an enrolled agent, have prepared the foregoing brief and, based upon my examination of the accounts and the information furnished to me, the statements made therein are known or believed to be true.

/s/ C. J. STULL, C.P.A. (Va.)  
Enrolled Agent

[fol. 1346]

BEFORE THE TAX COURT OF THE UNITED STATES

PETITIONERS' EXHIBIT No. 98

Adm. 158 (5/57)

UNITED STATES DEPARTMENT OF LABOR  
Washington, D. C.

## ATTESTATION

I, HEREBY ATTEST, that the attached document, Wholesale Price Indexes for Subgroups and Product Classes—Fuel, Power and Lighting Materials—Coal (1947-49 = 100) January 1947 to August 1957, is a true copy, which is in the official records of the United States Department of Labor, Bureau of Labor Statistics.

Signed at Washington, D. C., 11 day of October, 1957.

(Acting) /s/ W. DUANE EVANS  
Commissioner of Labor Statistics

## CERTIFICATE

I, HEREBY CERTIFY, that W. Duane Evans, who signed the foregoing attestation, is now and was at the time of signing the Acting Commissioner of Labor Statistics, and that full faith and credit should be given to his acts as such.

IN WITNESS THEREOF, I, James E. Dodson, duly designated by the Secretary of Labor as Authentication Officer of the Department of Labor, have hereunto subscribed my name and caused the seal of the Department of Labor to be affixed this 11 day of October, 1957.

[Seal]

/s/ JAMES E. DODSON  
Authentication Officer  
United States Department of Labor

U.S. DEPARTMENT OF LABOR  
Bureau of Labor Statistics  
Division of Prices and Cost of Living  
Washington 25, D. C.

WHOLESALE PRICE INDEXES FOR SUBGROUPS AND PRODUCT CLASSES  
FUEL, POWER AND LIGHTING MATERIALS - COAL\*  
(1947-49=100)

	05-1	05-11	05-12	05-12-01
Year and :	Coal	Pennsylvania	Bituminous Coal	Bituminous Coal
Month :	Coal	Anthracite	Bituminous Coal	Domestic Sizes
<u>1956</u>				
Yr. Avg.	114.5	123.8	112.6	115.4
Jan.	109.9	123.0	106.7	116.7
Feb.	109.9	128.0	106.7	116.6
Mar.	110.1	128.0	107.0	114.0
Apr.	111.7	115.1	110.7	107.1
May	111.9	115.1	111.0	107.9
June	112.3	115.1	111.4	109.8
July	112.9	113.8	111.6	111.1
Aug.	113.8	118.8	112.6	114.4
Sept.	114.4	120.3	113.0	116.4
Oct.	121.0	125.3	119.9	122.9
Nov.	122.0	131.6	120.1	123.7
Dec.	123.5	142.0	120.2	124.0
<u>1957</u>				
Yr. Avg.	124.1	142.0	120.3	124.1
Jan.	124.1	142.0	120.3	124.1
Feb.	124.0	142.0	120.3	124.1
Mar.	123.6	142.0	120.3	121.4
Apr.	123.2	128.9	121.3	116.5
May	123.3	128.9	121.9	116.1
June	123.3	128.9	122.0	117.2
July	124.0	132.3	122.3	119.1
Aug.	124.4	132.7	122.6	121.2
Sept.				
Oct.				
Nov.				
Dec.				

Division of Prices and Cost of Living  
Washington 25, D. C.

WHOLESALE PRICE INDEXES FOR SUBGROUPS AND PRODUCT CLASSES  
FUEL, POWER AND LIGHTING MATERIALS - COALS  
(1947-49=100)

	05-1	05-11	05-12	05-12-01
Year and :		Pennsylvania		Bituminous Coal
Month :	Coal	Anthracite	Bituminous Coal	Domestic Sizes

1956

Yr. Avg.	114.5	123.8	112.6	115.1
Jan.	109.9	123.0	106.7	116.7
Feb.	109.9	128.0	106.7	116.6
Mar.	110.1	128.0	107.0	114.0
Apr.	111.7	115.1	110.7	107.1
May	111.9	115.1	111.0	107.9
June	112.3	115.1	111.4	109.8
July	112.9	118.8	111.6	111.1
Aug.	113.8	118.8	112.6	114.4
Sept.	114.4	120.3	113.0	116.4
Oct.	121.0	125.3	119.9	120.9
Nov.	122.0	131.6	120.1	123.7
Dec.	123.5	142.0	120.2	124.0

1957

Yr. Avg.				
Jan.	124.1	142.0	120.8	124.1
Feb.	124.0	142.0	120.8	124.1
Mar.	123.6	142.0	120.3	121.4
Apr.	123.2	128.9	121.8	116.5
May	123.3	128.9	121.9	116.1
June	123.3	128.9	122.0	117.2
July	124.0	132.3	122.3	119.1
Aug.	124.4	132.7	122.6	121.2
Sept.				
Oct.				
Nov.				
Dec.				

[fol. 1347]

\*January 1947 through April 1954, Prepared Sizes (Code 05-12-01). Beginning May 1954 special index of domestic Sizes (Codes 05-12-04 and 05-12-05).



U.S. DEPARTMENT OF LABOR  
Bureau of Labor Statistics  
Division of Prices and Cost of Living  
Washington 25, D. C.

WHOLESALE PRICE INDEXES FOR SUBGROUPS AND PRODUCT CLASSES  
FUEL, POWER AND LIGHTING MATERIALS - COAL  
(1947-49=100)

	05-1	05-11	05-12	05-12-01
Year and Month :	Coal	Pennsylvania Anthracite	Bituminous Coal	*Bituminous Coal Domestic Sizes
<u>1953</u>				
Yr. Avg.	112.8	138.6	103.4	111.3
Jan.	116.3	141.3	112.0	117.1
Feb.	115.9	141.3	111.6	116.8
Mar.	114.4	141.4	109.8	113.4
Apr.	111.2	133.2	107.5	106.6
May	110.8	133.2	107.0	106.4
June	111.2	135.3	107.1	107.4
July	111.8	137.9	107.4	108.7
Aug.	111.7	139.5	106.9	110.2
Sept.	112.3	141.1	107.3	111.1
Oct.	112.5	139.4	107.9	112.6
Nov.	112.5	139.6	107.9	112.6
Dec.	112.5	139.6	107.9	112.5
<u>1954</u>				
Yr. Avg.	106.3	128.6	102.4	108.8
Jan.	111.9	139.6	107.1	113.0
Feb.	110.9	139.6	106.0	112.2
Mar.	107.9	139.6	102.5	106.3
Apr.	104.1	120.2	101.4	103.7
May	104.6	124.6	101.2	103.6
June	104.7	126.3	101.1	101.2
July	104.9	126.3	101.2	106.7
Aug.	105.2	127.1	101.5	103.5
Sept.	105.5	127.1	101.8	110.8
Oct.	105.1	123.5	101.9	112.1
Nov.	105.1	124.4	101.8	112.3
Dec.	105.2	125.4	101.7	112.2
<u>1955</u>				
Yr. Avg.	104.8	120.8	102.0	110.2
Jan.	105.2	126.0	101.7	112.2
Feb.	105.2	126.0	101.6	112.1
Mar.	105.1	126.0	101.5	111.8
Apr.	102.3	126.0	98.4	102.7
May	100.4	112.8	98.1	102.8
June	100.6	112.8	98.4	103.6

[fol. 1348]



(1947-49=100)

	05-1	05-11	05-12	05-12-01
Year and		Pennsylvania		*Bituminous Coal
Month	Coal	Anthracite	Bituminous Coal	Domestic Sizes

<u>1953</u>				
Yr. Avg.	112.8	138.6	103.4	111.3
Jan.	116.3	141.3	112.0	117.1
Feb.	115.9	141.3	111.6	116.8
Mar.	114.4	141.4	109.8	113.4
Apr.	111.2	133.2	107.5	106.6
May	110.8	133.2	107.0	106.4
June	111.2	135.3	107.1	107.4
July	111.8	137.9	107.4	108.7
Aug.	111.7	139.5	106.9	110.2
Sept.	112.3	141.1	107.3	111.1
Oct.	112.5	139.4	107.9	112.6
Nov.	112.5	139.6	107.9	112.6
Dec.	112.5	139.6	107.9	112.5

<u>1954</u>				
Yr. Avg.	106.3	128.6	102.4	108.8
Jan.	111.9	139.6	107.1	113.0
Feb.	110.9	139.6	106.0	112.2
Mar.	107.9	139.6	102.5	106.3
Apr.	104.1	120.2	101.4	103.7
May	104.6	124.6	101.2	103.6
June	104.7	126.3	101.1	104.2
July	104.9	126.3	101.2	106.7
Aug.	105.2	127.1	101.5	108.5
Sept.	105.5	127.1	101.6	110.8
Oct.	105.1	123.5	101.9	112.1
Nov.	105.1	124.4	101.8	112.3
Dec.	105.2	125.4	101.7	112.2

<u>1955</u>				
Yr. Avg.	104.8	120.8	102.0	110.2
Jan.	105.2	126.0	101.7	112.2
Feb.	105.2	126.0	101.6	112.1
Mar.	105.1	126.0	101.5	111.8
Apr.	102.3	126.0	98.4	102.7
May	100.4	112.8	98.1	102.8
June	100.6	112.8	98.4	103.6
July	101.5	115.8	99.0	106.3
Aug.	102.2	115.8	99.7	108.7
Sept.	108.1	117.7	106.3	114.6
Oct.	108.7	122.6	106.1	115.7
Nov.	107.0	123.0	106.4	116.0
Dec.	109.4	124.9	106.6	116.3

\*January 1947 through April 1954, Prepared Sizes (Code 05-12-01). Beginning May 1954, special index of Domestic Sizes (Codes 05-12-04 and 05-12-05).

[fol. 1348]

U.S. DEPARTMENT OF LABOR  
Bureau of Labor Statistics  
Division of Prices and Cost of Living  
Washington 25, D. C.

WHOLESALE PRICE INDEXES FOR SUBGROUPS AND PRODUCT CLASSES  
FUEL, POWER AND LIGHTING MATERIALS - COAL\*  
(1947-49=100)

Year and : Month :	05-1 Coal	05-11 Pennsylvania Anthracite	05-12 Bituminous Coal	05-12-01 **Bituminous Coal Domestic Sizes
<u>1950</u>				
Yr. Avg.	106.2	110.6	105.5	110.0
Jan.	107.0	107.6	107.0	111.7
Feb.	107.6	107.6	107.6	113.0
Mar.	109.0	110.2	108.8	114.5
Apr.	105.7	111.0	104.8	106.9
May	104.7	107.8	104.2	106.5
June	104.8	108.8	104.1	106.8
July	105.1	109.7	104.3	107.5
Aug.	105.6	111.1	104.6	108.8
Sep.	106.1	112.2	105.0	110.1
Oct.	106.3	113.1	105.2	111.2
Nov.	106.3	114.1	105.0	111.2
Dec.	106.3	114.5	105.0	111.3
<u>1951</u>				
Yr. Avg.	108.4	123.0	105.9	110.0
Jan.	106.5	115.2	105.0	111.1
Feb.	110.6	124.7	103.2	114.1
Mar.	110.1	124.7	107.6	112.7
Apr.	108.2	121.2	105.9	107.0
May	107.8	120.3	105.6	106.9
June	108.1	121.9	105.7	107.4
July	107.2	123.0	104.5	107.7
Aug.	107.5	124.0	104.6	108.5
Sept.	108.4	125.2	105.5	110.1
Oct.	108.7	125.2	105.8	110.8
Nov.	108.8	125.2	106.0	111.4
Dec.	108.9	125.2	106.1	111.7
<u>1952</u>				
Yr. Avg.	108.7	124.8	105.9	110.0
Jan.	108.8	125.2	106.0	111.7
Feb.	108.8	125.2	106.0	111.6
Mar.	108.7	125.2	105.8	111.2
Apr.	104.9	117.5	102.8	104.7
May	104.9	117.9	102.7	104.2
June	105.3	119.0	102.9	105.2
July	106.0	120.6	103.5	107.0
Aug.	106.5	122.1	103.7	107.0

[fol. 1349]

FUEL, POWER AND LIGHTING MATERIALS - COAL  
(1947-49=100)

Year and Month	05-1 Coal	05-11 Pennsylvania Anthracite	05-12 Bituminous Coal	05-12-01 **Bituminous Coal Domestic Sizes
<u>1950</u>				
Yr. Avg.	106.2	110.6	105.5	110.0
Jan.	107.0	107.6	107.0	111.7
Feb.	107.6	107.6	107.6	113.0
Mar.	109.0	110.2	106.8	114.5
Apr.	105.7	111.0	104.8	106.9
May	104.7	107.8	104.2	106.5
June	104.8	108.8	104.1	106.8
July	105.1	109.7	104.3	107.5
Aug.	105.6	111.1	104.6	108.8
Sept.	106.1	112.2	105.0	110.1
Oct.	106.3	113.1	105.2	111.2
Nov.	108.3	114.1	105.0	111.2
Dec.	106.3	114.5	105.0	111.3
<u>1951</u>				
Yr. Avg.	108.4	123.0	105.9	110.0
Jan.	106.5	115.2	105.0	111.1
Feb.	110.6	124.7	103.2	114.1
Mar.	110.1	124.7	107.6	112.7
Apr.	108.2	121.2	105.9	107.0
May	107.8	120.3	105.6	106.9
June	108.1	121.9	105.7	107.4
July	107.2	123.0	104.5	107.7
Aug.	107.5	124.0	104.6	108.5
Sept.	108.4	125.2	105.5	110.1
Oct.	106.7	125.2	105.8	110.8
Nov.	108.8	125.2	106.0	111.4
Dec.	108.9	125.2	106.1	111.7
<u>1952</u>				
Yr. Avg.	108.7	124.8	105.9	110.0
Jan.	108.8	125.2	106.0	111.7
Feb.	108.8	125.2	106.0	111.6
Mar.	108.7	125.2	105.8	111.2
Apr.	104.9	117.5	102.8	104.7
May	104.9	117.9	102.7	104.2
June	105.3	119.0	102.9	105.2
July	106.0	120.6	103.5	107.0
Aug.	106.5	122.4	103.7	107.9
Sept.	107.6	124.5	104.7	110.1
Oct.	113.3	129.4	110.5	114.6
Nov.	113.6	129.4	110.9	114.7
Dec.	116.1	141.3	111.8	116.9

\*This does not replace the official index prior to January 1952. The only official index up to and including December 1951 is the former index series (1926=100).

\*\*January 1947 through April 1954, Prepared Sizes (Code 05-12-01). Beginning May 1954-special index of Domestic Sizes (Codes 05-12-04 and 05-12-05).



**U.S. DEPARTMENT OF LABOR**  
**Bureau of Labor Statistics**  
**Division of Prices and Cost of Living**  
**Washington 25, D. C.**

**WHOLESALE PRICE INDEXES FOR SUBGROUPS AND PRODUCT CLASSES**  
**FUEL, POWER AND LIGHTING MATERIALS - COAL\***  
**(1947-49=100)**

Year and Month :	05-1 :	05-11 :	05-12 :	05-12-01 :
Month :	Coal :	Pennsylvania Anthracite :	Bituminous Coal :	**Bituminous Coal Domestic Sizes :
<b>1947</b>				
Yr. Avg.	88.0	91.2	87.4	86.9
Jan.	78.2	83.9	76.4	76.8
Feb.	78.3	88.2	76.6	77.0
Mar.	78.4	83.2	76.7	77.0
Apr.	78.7	86.8	77.3	77.4
May	78.7	85.3	77.6	77.5
June	79.1	85.9	78.0	77.6
July	92.1	86.6	93.1	91.8
Aug.	97.4	96.0	97.6	96.1
Sept.	98.0	97.0	98.2	96.6
Oct.	98.7	97.1	99.0	97.4
Nov.	99.0	97.1	99.3	98.3
Dec.	99.3	97.1	99.7	99.4
<b>1948</b>				
Yr. Avg.	106.2	102.4	106.9	106.2
Jan.	100.0	97.1	100.5	100.0
Feb.	100.1	97.1	100.6	100.3
Mar.	100.1	97.1	100.6	100.4
Apr.	100.9	97.1	101.5	100.8
May	102.4	97.3	103.2	101.9
June	102.9	98.5	103.6	102.8
July	110.9	104.3	112.0	111.1
Aug.	111.6	107.9	112.2	111.6
Sept.	111.6	108.0	112.2	111.7
Oct.	111.4	108.0	111.9	111.4
Nov.	111.3	108.0	111.9	111.5
Dec.	111.3	108.0	111.9	111.5
<b>1949</b>				
Yr. Avg.	105.8	106.4	105.7	106.9
Jan.	110.7	103.0	111.1	110.9
Feb.	110.3	103.0	110.7	110.5
Mar.	108.7	103.0	108.9	109.4
Apr.	104.8	105.3	104.7	104.7
May	103.8	103.6	103.8	103.8
June	103.7	104.4	103.6	104.4
July	103.9	104.8	103.8	105.0
Aug.	104.0	105.9	103.6	105.2

Year and Month	05-1	05-11	05-12	05-12-01
Coal	Pennsylvania	Anthracite	Bituminous Coal	Domestic Sizes
<b>1947</b>				
Yr. Avg.	88.0	91.2	87.4	86.9
Jan.	75.2	83.9	76.4	76.8
Feb.	78.3	88.2	76.6	77.0
Mar.	78.4	83.2	76.7	77.0
Apr.	78.7	86.8	77.3	77.4
May	78.7	85.3	77.6	77.5
June	79.1	85.9	78.0	77.6
July	92.1	86.6	93.1	91.8
Aug.	97.4	96.0	97.6	96.1
Sept.	98.0	97.0	98.2	96.6
Oct.	98.7	97.1	99.0	97.4
Nov.	99.0	97.1	99.3	98.3
Dec.	99.3	97.1	99.7	99.4
<b>1948</b>				
Yr. Avg.	106.2	102.4	106.9	106.2
Jan.	100.0	97.1	100.5	100.0
Feb.	100.1	97.1	100.6	100.3
Mar.	100.1	97.1	100.6	100.4
Apr.	100.9	97.1	101.5	100.8
May	102.4	97.3	103.2	101.9
June	102.9	98.5	103.6	102.8
July	110.9	104.3	112.0	111.1
Aug.	111.6	107.9	112.2	111.6
Sept.	111.6	108.0	112.2	111.7
Oct.	111.4	108.0	111.9	111.4
Nov.	111.3	108.0	111.9	111.5
Dec.	111.3	108.0	111.9	111.5
<b>1949</b>				
Yr. Avg.	105.8	106.4	105.7	106.9
Jan.	110.7	103.0	111.1	110.9
Feb.	110.3	103.0	110.7	110.5
Mar.	108.7	108.0	108.9	109.4
Apr.	104.8	105.3	104.7	104.7
May	103.6	103.6	103.8	103.8
June	103.7	104.4	103.6	104.4
July	103.9	104.8	103.8	105.0
Aug.	104.0	105.9	103.6	105.2
Sept.	104.1	106.9	103.6	105.7
Oct.	104.3	107.6	103.7	105.9
Nov.	105.4	107.6	105.0	107.8
Dec.	106.2	107.6	106.0	109.2

\*This does not replace the official index prior to January 1952. The only official index up to and including December 1951 is the former index series (1926=100).

\*\*January 1947 through April 1954, Prepared Sizes (Code 05-12-01). Beginning May 1954 special index of Domestic Sizes (Codes 05-12-04 and 05-12-05).

[fol. 1350]

[fol. 1352]

IN UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT  
No. 9179

ROBERT LEE MERRITT and WINNIE MERRITT; GEORGE WESLEY  
MERRITT and FANNIE J. MERRITT; JACK D. MERRITT  
and WILLA GRAY MERRITT; VIRGINIA BOWLING and GLADYS  
BOWLING, and JAMES O. WATSON, 3RD, and LUCY J.  
WATSON, Petitioners,

*versus*

COMMISSIONER OF INTERNAL REVENUE, Respondent,

*and*

COMMISSIONER OF INTERNAL REVENUE, Petitioner,

*versus*

PARAGON JEWEL COAL COMPANY, INC., Respondent.

On Petitions to Review the Decisions of the Tax Court  
of the United States.

Argued January 13, 1964

Before HAYNSWORTH, BRYAN and J. SPENCER BELL, Cir-  
cuit Judges.

[fol. 1352] John Y. Merrell for Petitioners, Taxpayers;  
Michael Mulrone, Attorney, Department of Justice (Louis  
F. Oberdorfer, Assistant Attorney General, and Lee A.  
Jackson and Melva M. Graney, Attorneys, Department of  
Justice, on brief) for Commissioner of Internal Revenue,  
and Frederick Bernays Wiener (Leroy Katz and Carl C.  
Gillespie on brief) for Respondent, Paragon Jewel Coal  
Co., Inc.

OPINION—Entered March 17, 1964

J. SPENCER BELL, Circuit Judge:

These are consolidated appeals from the Tax Court. The  
issue is whether the lessee, Paragon Jewel Coal Company,



Inc. [hereinafter referred to as Paragon], is entitled to the entire depletion deduction on the coal mined from its leased property or whether the several contract mine operators, petitioners in this action [hereinafter referred to as the operators], are entitled to a part of that depletion deduction based upon the amounts received by them respectively for the coal which each of them mined under agreements with Paragon. The Tax Court, which heard the cases together, decided that the lessee, Paragon, was entitled to the entire percentage depletion deduction. The operators appeal, contending that Paragon is required to share the deduction with them. The Commissioner, who took a neutral position as between the petitioners and Paragon before the Tax Court, appeals the decision in Paragon's case in order to protect his position as a stakeholder, conceding that either the operators or the lessee is entitled to the deduction, but not both.

Since the Commissioner concedes that either the operators or the lessee, Paragon, is entitled to the deduction, we [fol. 1353] find it unnecessary to go into all of the factual background, but shall confine ourselves to that part which we consider relevant to a decision of the issue between the parties. Paragon is the assignee of certain leases of coal bearing lands under which it has paid minimum royalties, tonnage royalties and land taxes. It has made substantial investments on the properties in order to prepare itself to process, ship and market the coal which was produced. Paragon's experience was as a processor and seller of coal rather than a producer; furthermore it lacked the capital to go into the producing end of the business. Rather than mine the coal itself, it entered into oral agreements with the petitioning operators and others to mine the coal by a method known as drift mining.<sup>1</sup> In addition to the equipment necessary for storing and processing the coal, Paragon installed a road running around the mountain close to the outcrop line of the coal over which the coal could be trucked

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<sup>1</sup> Drift mining is done by driving a horizontal shaft into the hillside in order to extract the coal from seams which are usually less than three feet in thickness. The process is a difficult and economically marginal operation.

from the mines to Paragon's tippie, where Paragon cleaned, sized and sold the coal.

Beginning with the Stilwells in 1951 (who are not petitioners here), Paragon entered into oral leases with a number of operators, all of which were similar in terms. Under the agreement an operator would be allocated a specific surface area under which it might mine. The allocation was made either by pointing it out on the ground or by showing it to him on the over-all property map. The operator agreed to mine the coal within that area and deliver it to Paragon at the operator's own expense. All expenses of opening and operating the mines were borne by the several operators. Paragon agreed to pay a fixed price at the tippie, but it was understood that the price [fol. 1354] would, and in fact it did, vary with the market. The operators were required to use and pay for the services of Paragon's engineer and to operate and maintain their mines in accordance with state and federal regulations. The contracts were silent as to who was entitled to depletion. They contained no termination date and nothing was said between the parties on this subject. The Tax Court found that:

It was anticipated by both parties that a contractor [contract mine operator] would continue mining in the location assigned to him as long as the coal could be mined and sold at a profit and as long as the contractor employed proper mining methods and produced coal meeting Paragon's specifications.

Because the contracts did not contain a specific statement that they were *not* terminable at the will of Paragon and because they did not contain a specific statement that the operator had a right or obligation to mine to exhaustion, the Tax Court concluded that as a matter of law the operators did not under the contracts have such rights.

We must disagree with the Tax Court's conclusions of law. Its own findings as to the intent of the parties quoted above negates its conclusions as to the legal rights of the parties under the contract. The parties contemplated that the operators would, and the evidence shows that they did,

engage in large expenditures of time and money in preparing their respective sites for mining. We think the Tax Court was in error in concluding that because the oral contracts were silent on the point, the operators did not possess a non-terminable *right* to mine to exhaustion, especially in the face of the court's finding of an intent on [fol. 1355] the part of the parties to the contrary. It would be inequitable indeed to hold that Paragon might remain silent on this point until the operators had invested their time and money and then take the benefit of the operators' efforts at will and without cause. The burden was on Paragon to express the limitation, if any. *Jack's Cookie Co. v. Brooks*, 227 F.2d 935 (4 Cir. 1955), *cert. denied*, 351 U.S. 908 (1956). Paragon was under obligation to mine the property. These operators were performing Paragon's obligation under its leases and this constituted ample consideration running from the operators to Paragon to make their mutual intentions with respect to the contract binding on Paragon. The fact that the contracts did not fix upon the operators an *obligation* to mine to exhaustion does not vitiate the binding effect of the intent of the parties to vest in the operators a *right* to mine to exhaustion. That the operators could cease mining would not destroy the mutuality. *Phillips Petroleum Co. v. Buster*, 241 F.2d 178 (10 Cir.), *cert. denied*, 355 U.S. 816 (1957).

Thus we see under this interpretation of the contracts, the operators had a continuing right to produce the coal and to be paid therefor at a price which was closely related to the market price. By virtue of these contracts and their respective expenditures under them, the operators shared with Paragon an economic interest in the mineral which brings them within the rationale of *Parsons v. Smith*, 359 U.S. 215 (1959); *Elm Dev. Co. v. Commissioner*, 315 F.2d 488 (4 Cir. 1963); and *Stilwell v. United States*, 250 F.2d [fol. 1356] 736 (4 Cir. 1957).<sup>2</sup> The Tax Court's decisions are reversed and the cases remanded for entry of an order in conformity with this opinion.

Reversed and Remanded.

<sup>2</sup> Indeed the *Stilwell* case arose out of the same facts, although of course the record being different, it is not *res judicata*.

[fol. 1357] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT

No. 9179

ROBERT LEE MERRITT and WINNIE MERRITT; G. WESLEY  
MERRITT and FANNIE J. MERRITT; JACK D. MERRITT  
and WILLA GRAY MERRITT; VIRGINIA BOWLING and GLADYS  
BOWLING, and JAMES O. WATSON, 3RD, and LUCY J.  
WATSON, Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE, Respondent,  
and

COMMISSIONER OF INTERNAL REVENUE, Petitioner,

vs.

PARAGON JEWEL COAL COMPANY, INC., Respondent.

On Petitions to Review the Decisions of the Tax Court  
of the United States.

This cause came on to be heard on the record from the  
Tax Court of the United States, and was argued by counsel.

JUDGMENT—March 17, 1964

On consideration whereof, It is now here ordered and  
adjudged by this Court that the decisions of the said  
Tax Court of the United States, in this cause, be, and the  
same are hereby, reversed; and that this cause be, and the  
same is hereby, remanded to the Tax Court of the United  
States for the entry of an order in conformity with the  
opinion of the Court filed herein.

Clement F. Haynsworth, Jr., United States Circuit  
Judge; Albert V. Bryan, United States Circuit  
Judge; J. Spencer Bell, United States Circuit  
Judge.

[fol. 1358] Clerk's Certificate (omitted in printing).

[fol. 1359]

## SUPREME COURT OF THE UNITED STATES

No. —, October Term, 1963

COMMISSIONER OF INTERNAL REVENUE, Petitioner,

vs.

ROBERT LEE MERRITT, et al.

ORDER EXTENDING TIME TO FILE PETITION FOR  
WRIT OF CERTIORARI—June 11, 1964

Upon Consideration of the application of counsel for petitioner,

It Is Ordered that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including July 15, 1964.

Earl Warren, Chief Justice of the United States.

[fol. 1360]

## SUPREME COURT OF THE UNITED STATES

No. 134, October Term, 1964

PARAGON JEWEL COAL COMPANY, INC., Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE.

## ORDER ALLOWING CERTIORARI—October 12, 1964

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fourth Circuit is granted, and the case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.



[fol. 1361]

## SUPREME COURT OF THE UNITED STATES

No. 237, October Term, 1964

COMMISSIONER OF INTERNAL REVENUE, Petitioner,

- VS.

ROBERT LEE MERRITT, et ux., et al.

## ORDER ALLOWING CERTIORARI—October 26, 1964

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fourth Circuit is granted. The case is consolidated with No. 134 and a total of one and one-half hours is allotted for oral argument of both cases.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.